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In the
Supreme Court of the United States
OCTOBER TERM, 1998

CHILDREN OF THE ROSARY, KATHERINE A. SABELKO, AND ARIZONA CIVIL LIBERTIES UNION,
Petitioners,

vs.

THE CITY OF PHOENIX, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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1488

QUESTIONS PRESENTED

After a rule prohibiting religious messages in its transit display spaces was declared unconstitutional, the City of Phoenix amended its regulation to limit all messages that would be accepted for display to those that propose a commercial transaction. Two nonprofit organizations (Petitioners) sought to display messages and were refused. The Ninth Circuit concluded that the display spaces were nonpublic fora and that the regulation was viewpoint neutral, reasonable, and constitutionally applied to exclude Petitioners. The following questions are presented:

1. Does the intention to prohibit religious and political speech invalidate a content-based regulation of speech?
2. Is it constitutional for a City to limit access to its transit display spaces to only messages proposing a commercial transaction, thereby excluding political and religious messages from the forum?
3. Does the judgment in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1976), pretermit the public forum status of transit display spaces on the *exterior* of city-owned buses?
4. Has the *Lehman* plurality, over time and in light of the subsequent development of the public forum doctrine, proven to be inconsistent with that doctrine and with proper constitutional constraints on municipal regulation of transit display spaces?

RULE 14.1(b) STATEMENT

In addition to the parties listed in the caption, the following additional parties are Respondents here and were Appellees in the court below:

> Richard C. Thomas, in his official capacity as Public Transit Director for the City of Phoenix; Neal Manske, in his official capacity as Deputy Director, Phoenix Transit Department; ATC/VANCOM Management Services, Inc.; and, Transportation Displays, Incorporated.

RULE 29.6 STATEMENT

Children of the Rosary has neither a parent company nor any wholly owned subsidiaries. The Arizona Civil Liberties Union, an affiliate of the American Civil Liberties Union, is a separately incorporated organization, and has neither a parent company nor any wholly owned subsidiaries.

TABLE OF CONTENTS

Page

Questions Presented i

Rule 14.1(b) Statement ii

Rule 29.6 Statement ii

Table of Authorities vi

Decisions Below 1

Jurisdictional Statement 1

Constitutional Provisions and Municipal Regulations Involved in the Case 1

Statement of the Case 2

A. Statement of Facts 2

B. Course of Proceedings 4

1. The District Court Decision 4

2. The Court of Appeals Decision 6

REASONS FOR GRANTING THE PETITION 9

I. THE QUESTIONS PRESENTED ARE IMPORTANT AND SUBSTANTIAL 9

A. The Inversion of the Relative Constitutional Values of Commercial and Noncommercial Expression Presents an Important and Substantial Federal Question 9

TABLE OF CONTENTS–*cont'd*

Page

B. The City's Purposeful Exclusion of Protected Religious And Political Expression Presents an Important And Substantial Federal Question 11

C. The Ninth Circuit's Reliance on The Plurality Opinion Accompanying This Court's Decision in *Lehman v. City of Shaker Heights* Presents an Important And Substantial Federal Question 13

II. THE DECISION OF THE NINTH CIRCUIT CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS 14

A. The Decision Below Conflicts With A Decision of the District of Columbia Circuit 14

B. The Decision Below Conflicts With A Decision of the First Circuit 18

C. The Decision Below Conflicts With Decisions of the District of Columbia and Second Circuits 21

Conclusion 24

Table of Contents—cont'd

Page

Appendices

A. Opinion, *Children of the Rosary v. City of Phoenix*, No. 97-16821 (9th Cir. 1998) 1a

B. Memorandum of Decision and Order, *Children of the Rosary v. City of Phoenix*, No. 97-138-PHX-SMM (D. Ariz. 1997) 28a

C. Order denying rehearing and rejecting suggestion of rehearing en banc, *Children of the Rosary v. City of Phoenix*, No. 97-16821 (9th Cir. 1998) .. 75a

D. Constitutional Provisions and Municipal Regulations Involved in the Case 77a

TABLE OF AUTHORITIES

Page(s)

Cases

AIDS Action Committee v. MBTA, 42 F.3d 1 (1st Cir. 1994) 19-20

Airline Pilots Ass'n Int'l v. Dept. of Aviation, 45 F.3d 1144 (7th Cir. 1994) 18

Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998) ..... 1, *passim*

Christ's Bride Ministries, Inc. v. SEPTA, 148 F.3d 242 (3d Cir. 1997) 14, 23-24

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) 12

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993) 12, 15

Lebron v. WMATA, 749 F.2d 893 (D.C. Cir. 1984) 13, 22-23

Lee v. ISKCON, 505 U.S. 830 (1992) 17-18

Lehman v. City of Shaker Heights, 418 U.S. 298 (1976) ..... i, 6, 13-15

Metro Display Advertising v. City of Victorville, 143 F.3d 1191 (9th Cir. 1998) 14

Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) 10-11, 17

TABLE OF AUTHORITIES—cont'd

Page(s)

***Cases**—cont'd*

Multimedia Publishing Co. v. Greenville-Spartanburg Airport District, 991 F.2d 154 (4th Cir. 1993) 17

New York Magazine v. MTA, 136 F.3d 123 (2d Cir. 1998) 11, 22-23

Planned Parenthood Ass'n v. Chicago Transit Authority, 767 F.2d 1225 (7th Cir. 1985) 13

Tinker v. Des Moines Indep. School District, 393 U.S. 503 (1969) 11

U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983) 11, 15-17

United Food and Commercial Workers Union v. SORTA, 163 F.3d 341 (6th Cir. 1998) 18, 20

Valentine v. Chrestensen, 316 U.S. 52 (1942) 6

Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 750 (1976) 6, 21

Wirta v. Alameda-Contra Costa Transit District, 68 Cal.2d 51, 64 Cal. Rptr. 430, 434 P.2d 982 (Cal. 1967) 16-17

TABLE OF AUTHORITIES—cont'd

Page(s)

Constitutional Provisions, Statutes, Municipal Regulations, and Rules

U.S. Const. Art. I ..... *passim*

U.S. Const. amend. XIV, sec. 1 ..... *passim*

Title 28 U.S.C. § 1254(1) 1

Title 28 U.S.C. § 1331 4

Title 28 U.S.C. § 1343 4

Title 42 U.S.C. § 1983 4

Supreme Court Rule 14.1(b) ii

Supreme Court Rule 29.6 ii

DECISIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported as *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998). App.1a.[1] The order denying rehearing and rejecting the suggestion of a rehearing en banc is unpublished. App. 75a. The decision of the district court is unpublished. App. 28a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Ninth Circuit entered judgment on August 28, 1998. The Court of Appeals denied the petition for rehearing and a suggestion of a rehearing en banc on December 7, 1998. This Court has jurisdiction under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND MUNICIPAL REGULATIONS INVOLVED IN THE CASE

The following constitutional provisions and municipal regulations, which are involved in the case, are set out in the Appendix to the Petition:

> U.S. Const. Art. I, App. 77a; U.S. Const. amend. XIV, sec. 1, App. 77a; the City of Phoenix Advertising Standards [original], App. 78a; the City of Phoenix Advertising Standards [amended], App. 80a.

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1. References to the Appendix to the Petition are indicated as "App. ___a."

STATEMENT OF THE CASE

A. Statement of Facts

The City of Phoenix makes display spaces available on the exterior of its public buses. In a prior suit, the Children of the Rosary ("C.O.R.") and Katherine Sabelko ("Sabelko") successfully challenged a regulation[2] banning the display of messages with religious content in those transit display spaces. *See Children of the Rosary, et al. v. City of Phoenix, et al.*, Civil Action No. 95-2161-PHX-RGS (D. Ariz. Oct. 22, 1996).[3] The Children of the Rosary and Sabelko had sought to place two messages in the transit display spaces. Both messages displayed the corporate name and logo of C.O.R. One message stated, "'Before I formed you in the womb, I knew you. — God' Jeremiah 1:5 CHOOSE LIFE!" The other message stated, "'All they asked was that we should continue to help the poor.' Galatians 2:10." Having obtained injunctive relief, the Children of the Rosary displayed its messages, for a brief time, in the City's transit display spaces.

After entry of judgment against it, the City amended the standards governing the messages acceptable for placement in its transit display spaces.[4] "In its Answer, the City of Phoenix admitted the facial ban on non-commercial speech is aimed at excluding 'political' and 'religious' speech from advertisement on City owned buses." App. at 30a. Under the amended

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2. The former regulation is included in the Appendix to the Petition at 78a.

3. No appeal was taken by the City of Phoenix or other defendants from the entry of judgment in that case.

4. The amended regulation is included in the Appendix to the Petition at 80a.

standards, the only messages eligible for display are those messages proposing a commercial transaction. After that, the City refused to display C.O.R.'s messages.

The Children of the Rosary changed the content of their message, adding an invitation to purchase bumper stickers from C.O.R.[5] The proposed message included the corporate logo and name, along with the following message: "'Before I formed you in the womb, I knew you.' - God Jeremiah 1:5 Purchase this message as a bumpersticker for your vehicle! Contact 602-848-8031 CHOOSE LIFE!" C.O.R. submitted its proposal on about November 15, 1996.

The City rejected C.O.R.'s proposed message because the new message did not comply with the amended standards. The City has persisted in its refusal to display the messages submitted by C.O.R.

The Arizona Civil Liberties Union ("AzCLU") also submitted a written request to display a message for one month in one of the City's transit display spaces. The proposed message stated, "'The ACLU Supports Free Speech for Everyone' To Purchase this bumper sticker please call 602-650-1967." The City rejected AzCLU's proposed message, explaining, "The transportation department has determined that your ad does not qualify under the advertising guidelines enacted November 1, 1996. . . ."

After the amendment of the City's policy, the display spaces included messages:

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5. The sale of bumper stickers has long been a significant source of income for C.O.R. *See Children of the Rosary et al. v. City of Phoenix, et al.*, No. 97-138-PHX-SMM, Third Declaration of Katherine A. Sabelko in support of Plaintiffs' Motion for Preliminary Injunction, ¶¶ 3-8 (D. Ariz.).

- suggesting the advisability of population reduction from an organization called "Zero Population Growth";
- from the Arizona Department of Corrections about career opportunities with that agency;
- soliciting donations to the Special Olympics of Arizona;
- from the American Cancer Society encouraging women to obtain mammograms;
- advertising a popular television series, "The X Files";
- promoting the Phoenix Zoo and the Phoenix Art Museum;
- promoting the movies "Absolute Power," and "Gridlock'd"; and,
- promoting the radio talk shows of conservative raconteurs G. Gordon Liddy, Michael Reagan, and Oliver North.

App. 66a-73a.

B. Course of Proceedings

1. The District Court Decision

On January 23, 1997, the Petitioners filed this action in the United States District Court for the District of Arizona. Petitioners sued under 42 U.S.C. § 1983, alleging violation of their federal constitutional rights by the City's selective rejection of their proposed messages. Jurisdiction over this matter in the district court rested on 28 U.S.C. §§ 1331 and 1343.

The district court denied Petitioners' motion for a preliminary injunction.

The district court found that Petitioners had satisfactorily shown irreparable injury. App. 29a. The court did not doubt that First Amendment rights were implicated by the

City's decision to limit access to its transit display spaces based upon the content of messages proposed to be displayed in them. App. 30a.

The court disagreed with the Petitioners' argument that the transit display spaces were limited public fora. App. 32a-36a. The court reviewed the amended regulation under the standard for restrictions in nonpublic fora. App. 36a-38a.

The court held that the regulation limiting displays to messages that propose a commercial transaction was reasonable. App. 39a-42a. The court identified three justifications for the amended regulation: maintenance of perceived political and religious neutrality; fear that display of political and religious messages might subject buses, passengers and drivers to possible physical harm resulting from vandalism, terrorism, sabotage, or mob violence; and, fear that such uses of its transit display spaces would decrease their financial value by discouraging commercial entities from promulgating their messages through the same medium. App. 39a-40a.

The court found that the regulation, although content-based, was viewpoint neutral. App. 44a. In the court's view, Phoenix did "not disallow [C.O.R.'s] proposed advertisements because they approach an issue from a Christian perspective. Rather, the Policy disallows all political and religious speech because they do not 'propose a commercial transaction.'" App. 47a-48a.

The court rejected Petitioners' vagueness, overbreadth, and Establishment Clause arguments. App. 49a-51a, 51a-55a, 57a.

As to Petitioners' "as applied" challenge, the court decided that the Petitioners had "purposefully attempted to blur the distinction between commercial and non-commercial speech."

App. 63a-64a. In the court's view, the City's policy effectively limited the category of message that could be displayed to "'commercial price and product advertising.'" App. 66a (quoting *Virginia Pharmacy Board v. Virginia Citizens' Consumer Council*, 425 U.S. 750, 779-80 (1976)). The court did "no[t] doubt that the message[s]" of Petitioners were "'ideological communication[s]' in their most basic sense." App. 66a (quoting *Virginia Pharmacy Board*, 425 U.S. at 779-80). The court noted particularly its view that *Valentine v. Chrestensen*, 316 U.S. 52 (1942), controlled the disposition of this issue. App. 64a-65a.

Finally, the court considered the other advertisements appearing in the transit display spaces following the amendment of the City's regulation. App. 65a-73a. The court concluded that those messages either were within the terms of the amended regulation or were carried only because of pre-existing contractual arrangements. *Id.*

2. The Court of Appeals Decision

The Court of Appeals affirmed in an opinion by Associate Justice White (retired). App. 1a. Circuit Judge Noonan dissented from the judgment. App. 23a. A petition for rehearing was denied and a suggestion for rehearing en banc was rejected. App. 75a.

The appeals court concluded that the display spaces were nonpublic fora. App. 6a-11a. The appeals court relied on *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1976), as persuasive, if not controlling, authority. App. 7a-10a. The appeals court found that Justice Douglas's captive audience concerns were not limited to those who, because they rode the buses, were compelled to view messages not of their own choosing. App. 7a-8a. The appeals court persuaded that, because *Lehman* predated the current formulation of the public

forum doctrine, it was not a sound basis for decision of the appeal. App. 8a-9a.

The appeals court next considered whether allowing only messages proposing a commercial transaction was reasonable and viewpoint neutral. App. 11a-20a. The court concluded view that the justifications proffered by the City established the reasonableness of the amended regulation. App. 12a-13a.

The appeals court found no constitutional fault in the City's admitted purpose to exclude political and religious expression:

> The city certainly intended to reject political and religious speakers. But motive is not dispositive when there is no indication that the city is implementing the standard in a viewpoint discriminatory manner that reflects an intent to use the policy to exclude disfavored perspectives on the issues.

App.14a-15a.

The appeals court also affirmed the district court's judgment that Petitioners had failed to demonstrate any likelihood of success on their "as applied" challenge. App. 17a-20a. The court found that the ideologic component of the Petitioners' proposed messages overwhelmed any commercial component thereof. App. 17a.

The appeals court also affirmed the district court's rejection of the Petitioners' vagueness, overbreadth and under-inclusiveness arguments. App. 20a-22a.

Dissenting, Judge Noonan concluded that the messages offered by the Children of the Rosary and the Arizona Civil Liberties Union proposed commercial transactions. App. 25a. The record, he concluded, amply demonstrated that C.O.R. sold bumper stickers prior to the amendment of the City's

regulation.

Of greater moment, Judge Noonan considered it "something of an anomaly in First Amendment jurisprudence for more protection to be accorded commercial speech than is accorded noncommercial speech." App. 25a.

> Here, the message of a group acknowledging the sacredness of human life in the womb is rejected; Planned Parenthood could run an ad for an abortion clinic. The views clash; the city of Phoenix would give space to one and not the other. Analogously, if Arizona should come to permit physician-assisted suicide as does Oregon, Dr. Kevorkian could advertise his services on the sides of the buses of Phoenix, but the counter advice of advocates offering free counseling against this course would be forbidden. . . . A power company could extol its product. The Sierra Club, objecting to more dams, would be denied the forum. The makers of a pesticide could celebrate their wares; champions of pesticide- free farms would be barred. A developer could tout the quality of his homes; defenders of green space in the suburbs would have to be silent on the buses. The pornographer could advertise his shop; the defenders of neighborhood decency would be denied a reply. *In the America of 1998 to give the commercial advertiser space, without reference to the product being pushed, is for a city to take sides more than occasionally on issues of life and health and energy and the ecosystem.*

App. 25a-26a (emphasis added).

Judge Noonan found the City's justifications unreasonable. Indeed, he concluded, "the avoidance of violence against the buses seems to border on the absurd; nothing in the record

substantiates the fear." App. 27a. Of the other rationales, Judge Noonan concluded that neutrality on politics and religion and maintenance of standards attractive to business advertisers could be served by greater precision in identification of the kinds and contents of messages allowed. App. 27a.

REASONS FOR GRANTING THE PETITION

I. THE QUESTIONS PRESENTED ARE IMPORTANT AND SUBSTANTIAL.

A. The Inversion of the Relative Constitutional Values of Commercial and Noncommercial Expression Presents an Important and Substantial Federal Question.

The City of Phoenix operates a public transit system. Although it was not required to do so, it chose to create transit display spaces on the exterior of its system buses. In managing the transit display spaces, the City of Phoenix has always objected to the presentation of political and religious messages thereon and prohibited such messages from being displayed. A prior regulation banning political and religious messages resulted in the entry of summary judgment against the City of Phoenix in an earlier lawsuit brought by two of the present Petitioners. *Children of the Rosary, et al. v. City of Phoenix, et al.*, Civil Action No. 95-2161-PHX-RGS (D. Ariz. Oct. 22, 1996).

Stymied in its exclusion of political and religious speech from the transit display spaces by federal judicial interdiction, the City amended its regulation. The amendment excluded all messages from the transit display spaces except those that propose a commercial transaction. Thereafter, C.O.R. and AzCLU tried to place messages that described products available for sale from the organizations. The City refused to place either message. The City's decisions were approved by

the district court and the Ninth Circuit.

The plurality opinion in *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 513 (1981), correctly stated that this Court's "commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech." The plurality found impermissible the City of San Diego's decision to "invert this judgment, by affording a greater degree of protection to commercial speech than to noncommercial speech." 453 U.S. at 513. The plurality opinion in *Metromedia*, which accorded to core expression the highest order of consideration and protection, reflects the purpose, history, and tradition of the right to freedom of speech.

The *Metromedia* plurality found deeply troubling the vaunting of commercial expression over core speech. For example, the plurality noted the failure of the City to "explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city." *Id.*[6] Ultimately, in the view of the plurality, the Constitution simply could not permit the City's approach: "[i]nsofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information . . . is of greater value than the communication of

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6. In this respect, the dissent below mirrors the plurality in *Metromedia, Inc.* Judge Noonan, for example, found quite implausible the City of Phoenix's asserted fear that allowing religious or political messages in the transit display spaces would result in the danger of physical attacks on buses, drivers or passengers. 154 F.3d at 985 (claimed fear of violence "against the buses seems to border on the absurd").

noncommercial messages." *Id.*[7]

The City of Phoenix, to the contrary, took this exact approach and the Ninth Circuit has approved the constitutional inversion wrought in the amended regulation. This Court should grant the Petition so that it may address the substantial federal question presented by the constitutional inversion embodied in the decision of the Ninth Circuit.

B. The City's Purposeful Exclusion of Protected Religious And Political Expression Presents an Important And Substantial Federal Question.

The City of Phoenix elevated commercial expression over the position formerly enjoyed by core religious and political expression. The reason that the City did so is its admitted purpose to exclude political and religious expression from its transit display spaces. The amended policy reflects the City's "undifferentiated fear or apprehension of disturbance," *Tinker v. Des Moines Indep. School District*, 393 U.S. 503, 508 (1969), to the transit system. This purpose to exclude political and religious expression, which animated both the former and

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7. The Ninth Circuit's decision below notwithstanding, other Circuits have adopted and applied the premises of the plurality in *Metromedia*. *See, e.g.*, *New York Magazine v. MTA*, 136 F.3d 123, 131-32 (2d Cir. 1998) ("[w]hile we accord somewhat lowered scrutiny to government restrictions on the right to propose commercial transactions, . . . protecting the right to express skeptical attitudes toward the government ranks among the First Amendment's most important functions") (citations omitted); *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 770 (D.C. Cir. 1983) ("the government's approval of paid commercial, but not political, advertisements reverses the normal preference in our jurisprudence for noncommercial speech") (citations omitted).

the present regulations of the City of Phoenix, handily passed the constitutional scrutiny mustered against it in the Ninth Circuit's decision. As a result, the City of Phoenix, along with other government actors, state and federal, is advised that it is no longer inappropriate to disfavor core constitutional expression.

This Court has confronted and rejected just that sort of bias underlying government actions disfavoring religious and political expression. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (exclusion of religious perspective unconstitutional even in a nonpublic forum). Leaving no doubt that such governmental bias is constitutionally suspect, this Court quickly followed its decision in *Lamb's Chapel* with *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). In *Lukumi Babalu Aye*, this Court spurned Hialeah's effort to rid itself of the ritual animal sacrifice by Santeria practitioners. The Court found that the City's conduct was not neutral with respect to religion, even though the challenged regulation was, at least arguably, facially neutral. 508 U.S. at 533-35.

The litany of decisions in this Court's constitutional jurisprudence invalidating government actions that suppress religious or political expression extends well beyond these examples. The Ninth Circuit upheld just such an action. The roles of political speech and religious speech in the maintenance of our republican form of government should be inviolate. This Court should grant the Petition to address the substantial federal question presented by the failure of the Ninth Circuit to treat with appropriate gravity the City of Phoenix's admitted purpose to exclude religious and political expression from its transit display spaces.

C. The Ninth Circuit's Reliance on The Plurality Opinion Accompanying This Court's Decision in *Lehman v. City of Shaker Heights* Presents an Important And Substantial Federal Question.

No opinion accompanying the judgment of this Court in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1976), garnered a majority of the Justices of this Court. The Ninth Circuit, however, invoked and relied upon the plurality opinion, and to a lesser extent, the opinion concurring in the judgment by Justice Douglas. App. 7a-10a.[8] In fact, the decision below expands on the concurrence, extending Justice Douglas' solicitous concern for "captive audiences" *inside* the rapid transit vehicles to *passersby outside* on nearby streets and sidewalks. App. 7a-8a. Unwarranted as it is, the invocation and reliance on the *Lehman* plurality and on Justice Douglas' separate opinion present this Court with the important and substantial question of the continuing validity of the opinions and judgment in *Lehman*.

The Courts of Appeals routinely distinguish *Lehman* and have done so on the very point of which the Ninth Circuit had considered it the dispositive decision. *See, e.g., Planned Parenthood Ass'n v. Chicago Transit Authority*, 767 F.2d 1225, 1233 (7th Cir. 1985) ("*Lehman* stands for the proposition that the *interior* of a transit system's cars and buses is not a traditional public forum") (emphasis added); *Lebron v. WMATA*, 749 F.2d 893, 896 n.6 (D.C. Cir. 1984) (*Lehman* dealt with a ban on advertising "*inside* a city transit system")

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8. An equal number of Justices to those joining the plurality opinion disagreed and joined in a dissent from the judgment because they considered that the city had established "a public forum for communication." 418 U.S. at 315.

(emphasis added).[9]

This Court's reconsideration of *Lehman* should not be limited to the mere question of whether the case stands only for propositions related to transit display spaces inside buses or rapid transit vehicles. In the court below, the Petitioners argued that, because it predates the present formulation of the public forum doctrine, the Ninth Circuit should not treat *Lehman* as dispositive. Significant developments have occurred in this area of law, as this Court has drawn and refined the contours of the public forum doctrine. This Court should grant the Petition to resolve the constitutional questions presented by this Petition and in common with *Lehman*.

II. THE DECISION OF THE NINTH CIRCUIT CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

A. The Decision Below Conflicts With A Decision of the District of Columbia Circuit

The Children of the Rosary and the Arizona Civil Liberties Union assert that the City of Phoenix had created a public forum in its transit display spaces, from which their messages proposing the sale of bumper stickers bearing religious and political messages have been unconstitutionally excluded. The lower courts disagreed, and concluded that — as to the political and religious views sought to be promoted by the Petitioners — the City had not designated the spaces as public fora. App. 11a,

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9. *See also Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242, 254 (3d Cir. 1998) ("[i]n *Lehman*, the Court considered a ban on political advertising *in* the city's transit vehicles") (emphasis added); *Metro Display Advertising v. City of Victorville*, 143 F.3d 1191, 1194 (9th Cir. 1998) ("the municipality had a contract with the company that placed ads *in* buses or trolleys") (emphasis added).

35a.[10]

This Court has explained that regulations that affect speech in a nonpublic forum need only be reasonable and viewpoint neutral. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393-94 (1993). The Ninth Circuit, having concluded that the transit display spaces were nonpublic fora, examined the amended rule under the reasonableness standard. App. 11a-13a. The court did not question whether the City's proposed justifications for excluding all noncommercial expression, devised to accomplish the purpose of excluding political and religious messages, rose to the level of compelling or even substantial interests. The court did conclude, however, that each of the interests asserted by the City were reasonable. App. 12a.

In *U.S. Southwest Africa/Namibia Trade & Cultural Council v. U.S.*, 708 F.2d 760 (D.C. Cir. 1983), the Federal Aviation Administration refused to display a message in display spaces at Washington National Airport or Dulles International Airport. The message was "rejected solely because it was political in nature and thus perceived to be inconsistent with the government's interests in maintaining a purely commercial and public service advertising medium." 708 F.2d at 761. As applied, the FAA's rules had always been

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10. Neither the City nor the courts below have contended that the Petitioners' proposed messages were ineligible for placement for other reasons. The Petitioners were not denied space because they refused to pay for it; the copy was not declined because it was inelegant or less than aesthetically pleasing. Moreover the placement of messages for Special Olympics of Arizona and for the American Cancer Society prove that it was not the not-for-profit status of the Children of the Rosary and the Arizona Civil Liberties Union that prompted the exclusion of the proposed messages.

invoked "to prohibit ads 'which would be considered political or issue-oriented in nature, rather than commercial or public service.'" *Id.* at 762.

The District of Columbia Circuit reversed the trial court's judgment for the FAA. *Id.* at 761. The court explained:

> we hold only that the airport advertising opportunities made available to the public by the government cannot be shut off to political advertisements unless such advertisements can be shown to be basically incompatible with the government's substantial or compelling, countervailing interests.

Id. at 773.[11]

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11. This approach is consonant with that taken by the Supreme Court of California. In *Wirta v. Alameda-Contra Costa Transit District*, 68 Cal.2d 51, 64 Cal. Rptr. 430, 434 P.2d 982 (Cal. 1967), the California Supreme Court affirmed the entry of injunctive relief against a transit district from declining to carry messages proposed by an unincorporated association promoting the cause of world peace through education. 68 Cal.2d at 52-53, 64 Cal. Rptr. at 431-32, 424 P.2d at 983-84. Under the transit district's policy, only commercial solicitations for the sale of goods and services and messages related to issues and candidates on ballots during election seasons were permitted. The transit district had refused "an advertisement expressing ideas admittedly protected by the First Amendment for display in a forum which the agency has deemed suitable for the expression of ideas through the medium of paid advertisements." 424 P.2d at 985. The California Supreme Court concluded, "[t]he vice is not that the district has preferred one point of view over another, but that it chooses between classes of ideas entitled to constitutional protection, sanctioning the expression of only those selected, and banning all others. Thus the district's regulation exercises a most pervasive form of censorship." 424 P.2d at 986. Worse still, "the district's policy . . . goes even further and

Thus, in the Ninth Circuit, the decision to exclude religious and political messages from a transit display space need only be *reasonable*; but, in the District of Columbia Circuit, the exclusion of political messages from a transit display space can be justified only if the heightened justifications of a *substantial or compelling* interest are demonstrated.[12] It should go without

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affords total freedom of the forum to mercantile messages while banning the vast majority of opinions and beliefs extant which enjoy First Amendment protection because of their noncommercialism." *Id.* Presaging the view of the plurality in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981), the California Supreme Court concluded, "the policy of the district reverses these acceptable priorities and perversely gives preference to commercial advertising over nonmercantile messages." 424 P.2d at 986.

12. The D.C. Circuit proceeded on the conclusion that the transit display cases in that case were public fora. 708 F.2d at 764-67. The Fourth Circuit, however, has stated that the "reasonableness" standard applicable to restrictions affecting expression in nonpublic fora means something more than that a "regulation is rationally related to a legitimate governmental objective, as might be the case for a typical exercise of the government's police power. . . ." *Multimedia Publishing Co. v. Greenville-Spartanburg Airport District*, 991 F.2d 154, 159 (4th Cir. 1993). Because, as here, the regulation at issue in *Multimedia Publishing Co.* "affect[ed] protected First Amendment activity that is entitled to special solicitude even in [a] nonpublic forum," the Fourth Circuit concluded, "the reasonableness of a challenged regulation must be assessed in the light of the purpose of the forum and all the surrounding circumstances." 991 F.2d at 159 (internal quotation marks and citations omitted).

The Fourth Circuit's approach is consistent with Justice O'CONNOR's concurrence in *Lee v. ISKCON*, 505 U.S. 669 (1992). Justice O'CONNOR concluded that a ban on leafletting in airport terminals could not "be upheld as reasonable" on the record in that

saying that the latter approach reflects the actual purpose and long-understood working of the constitutional right to freedom of speech: to protect core political speech from government suppression. This Court should grant the Petition to resolve the conflict with the District of Columbia Circuit that has resulted from the decision of the Ninth Circuit.

B. The Decision Below Conflicts With A Decision of the First Circuit

The City admitted that its purpose in amending its transit display regulation was to assure the *continued exclusion* of political and religious expression. Answer, ¶ 6.10. The appeals court did not even pause over this troubling admission. In the appeals court's view, because the transit display spaces

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case. 505 U.S. at 685, 690. As Justice O'CONNOR explained, "the Port Authority has not offered any justifications or record evidence to support its ban on the distribution of pamphlets alone." 505 U.S. at 691. Justice O'CONNOR rejected the flat ban on leafletting because she could not "see how peaceful pamphleteering is incompatible with the multipurpose environment of the Port Authority airports," consequently, Justice O'CONNOR could not "accept that a total ban on that activity is reasonable without an explanation as to why such a restriction preserves the property for the several uses to which it has been put." 505 U.S. at 692 (internal quotation marks and citations omitted). *See also Airline Pilots Association International v. Department of Aviation*, 45 F.3d 1144, 1159 (7th Cir. 1994) ("the *reasonableness* of excluding political advertisements must be judged in light of the nature and purpose of the diorama display cases" "this inquiry . . . does require a determination of whether the proposed conduct would actually interfere with the forum's stated purposes") (internal quotation marks and citations omitted; emphasis added); *United Food & Commercial Workers Union v. SORTA*, 163 F.3d 341, 357 n.8 (6th Cir. 1998).

were *nonpublic* forum properties, the City was free to impose *content-based* restrictions on messages, so long as the City avoided exclusions based on viewpoint. App. 15a-16a.

The Ninth Circuit's decision directly conflicts with *AIDS Action Committee v. MBTA*, 42 F.3d 1 (1st Cir. 1994). There, the MBTA maintained transit display spaces similar to those at issue here. Under the MBTA's regulations, both commercial and public service messages were permitted in transit display spaces. *Id.* at 3. The MBTA required that messages "meet the same guidelines governing broadcast and private sector advertising with respect to good taste, decency and community standards"; in particular, such messages "must not describe, in a patently offensive way, sexual conduct specifically defined by the applicable state law." *Id.* at 3-4. Under the MBTA's regulation, "[a]dvertising containing messages or graphic representations pertaining to sexual conduct will not be accepted." *Id.* at 4.

The AIDS Action Committee sought to place messages in the transit display spaces. *Id.* at 3. The messages identified sexual abstinence as the only sure way to avoid transmission of the HIV virus, and then encouraged the use of prophylactic devices to reduce the spread of the virus. *Id.* at 3-4. The messages used "sexual innuendo and double entendre" to communicate these views. *Id.* at 3. Because of the sexual suggestiveness and risque language in the messages, the MBTA refused to display them. Contemporaneously, the MBTA had allowed the display of sexually suggestive messages promoting a movie entitled, "Fatal Instinct." *Id.* at 5.

The First Circuit could not determine on the record before it whether the MBTA transit display spaces had been designated as public forum spaces. *Id.* at 9. The court concluded, however, that the district court had correctly

concluded that an injunction should issue. *Id.* at 13. The court stated, "we find that, in rejecting the 1993 AAC ads while running the 'Fatal Instinct' ads, the MBTA engaged in content discrimination which gave rise to an appearance of viewpoint discrimination, and that it has failed to explain that appearance away." *Id.* at 10. In a nonpublic forum the MBTA was free to engage in *content* discrimination, and it did so. The decisive factor for the First Circuit was that, in the circumstances, an *appearance* of prohibited *viewpoint* discrimination arose from that content discrimination. Alone, that unremedied *appearance* sufficed to satisfy the court that, despite its facial constitutionality, the MBTA regulation accomplished the unconstitutional result of viewpoint discrimination. *Id.* at 12.[13]

In the present case, the Ninth Circuit had before it, not merely the *appearance* of bias against religious and political expression, but the admitted animus of the City. Nonetheless, the court of appeals concluded that there was no likelihood of success, even on the Petitioners' as applied challenge. In *AIDS Action Committee*, the *appearance* of viewpoint bias warranted injunctive relief; here, the admitted fact of bias was disregarded. This Court should grant the Petition to resolve the conflict with the First Circuit that has resulted from the decision of the Ninth Circuit.

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13. The Sixth Circuit, consistent with the approach of the First Circuit, has expressed the view that, "[w]here the proffered justification for restricting access to a nonpublic forum is facially legitimate, *the government nevertheless violates the First Amendment when its stated purpose in reality conceals a bias against the viewpoint advanced by the excluded speakers*." *United Food and Commercial Workers Union v. SORTA*, 163 F.3d 341, 356 (6th Cir. 1998) (emphasis added).

C. The Decision Below Conflicts With Decisions of the District of Columbia and Second Circuits

The offer of product or pricing information is the essence of commercial speech. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 750, 779-80 (1976). Under the City's amended regulation, only messages proposing a commercial transaction may be accepted for display. To determine whether a message is eligible for display, the City of Phoenix preview the content and format of proposed displays. The City's review of content and format present a clear and, in this case, irresistible opportunity to exercise discretion in determining whether a message is "commercial" or "ideological."

The Children of the Rosary and the Arizona Civil Liberties Union sought to display their messages in the City's transit display spaces by advertising bumper stickers bearing those messages as available for sale through their offices. App. 3a, 62a-63a.[14] The City rejected these messages because they did not propose commercial transactions. Despite C.O.R.'s and AzCLU's plain invitations to purchase products, the Ninth Circuit and the district court accepted the City's determination. App. 17a, 63a-64a. The Ninth Circuit explained:

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14. That the Petitioners offered their political and religious messages for sale does not detract from the status of those messages as core expression. This Court has explained, "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another," that "[s]peech likewise is protected even though it is carried in a form that is 'sold' for profit," and "even though it may involve a solicitation to purchase or otherwise pay or contribute money." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (citing cases).

> The district court rejected the challenge, finding that the advertisements were 'ideological communications' and the essential issue-oriented nature of the advertisements could not be changed to commercial advertisements by simply adding an offer to purchase a bumpersticker containing a political or religious message. We agree with the district court.

App. 17a. Thus, the Ninth Circuit, as had the district court, left unchecked the City's arrogation to itself of discretion in the message review and selection process. The discretion that the City exercises — now with the approval of the Ninth Circuit — is unbridled.

The discretion to sift messages, finding that some are "contaminated" by ideological perspectives while others are not, has been found to be a constitutionally sound municipal function in the Ninth Circuit. In the District of Columbia and Second Circuits, however, such discretion proves constitutionally infirm. *See New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123, 131 (2d Cir. 1998); *Lebron v. WMATA*, 749 F.2d 893, 898-99 (D.C. Cir. 1984).

In *New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123, 131 (2d Cir. 1998), the Second Circuit found constitutionally defective the very kind of administrative discretion approved by the Ninth Circuit below. New York Magazine sought to display a message on city buses that portrayed its logo and contained the statement, "[p]ossibly the only good thing in New York Rudy hasn't taken credit for." 136 F.3d at 125. The city transportation authority refused to carry the messages, purportedly to preserve Mayor Guiliani's civil rights under state law. *Id.*

The Second Circuit said the transit authority's regulatory

scheme "vest[s] in government agencies the power to determine important constitutional questions properly vested in the judiciary." *Id.* The Second Circuit concluded "that where there are both commercial and political elements present in speech, even the determination whether the speech is commercial or not may be fraught with ambiguity and should not be vested in an agency such as the MTA." *Id.* The Second Circuit considered that it "need not decide whether the Advertisement is actually commercial speech or core-protected speech . . . ." *Id.*

In *Lebron v. WMATA*, 749 F.2d 893 (D.C. Cir. 1984), the District of Columbia Circuit found constitutional fault with the application of just that sort of administrative discretion in granting access to transit display spaces owned by the Washington Metropolitan Area Transit Authority. In *Lebron*, an artist was denied access to the transit display space to publish a photomontage bearing the legend, "Tired of the JELLYBEAN REPUBLIC." 749 F.2d 894-95. The artist intended to express his dissatisfaction with the administration of President Reagan. *Id.*

WMATA justified its denial on the ground that it had to exclude false and misleading messages. 749 F.2d at 895. The District of Columbia Circuit, in an opinion by Judge Bork joined by then-Judge Scalia, concluded that the transit display space regulation impermissibly authorized the Authority to exercise discretion in granting access to the transit display spaces based on truth or falsity of political messages. 749 F.2d at 898-99.[15]

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15. The unreliability of such transit authority decisions — predicted by Judge Bork in *Lebron* — is confirmed in another instance. In *Christ's Bride Ministries, Inc. v. SEPTA*, 148 F.3d 242 (3d Cir. 1997), the Third Circuit rejected an argument from the Southeastern Pennsylvania Transportation Authority ("SEPTA") that

This Court should grant the Petition to resolve the conflict with the District of Columbia and Second Circuits that has resulted from the decision of the Ninth Circuit.

CONCLUSION

The Petition should be granted.

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a message sought to be placed by Christ's Bride Ministries, Inc., was not, in fact, a *bona fide* political or public service message. SEPTA sought to justify the exclusion because the message included a "1-800 number listed on the poster" and those who responded to the message by calling that number "may receive information advertising the services of medical malpractice attorneys . . . ." 148 F.3d at 247. The Third Circuit gave no credence to the classification made by SEPTA. *Id.*

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Dated: March 8, 1999.

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHILDREN OF THE ROSARY;
KATHERINE A. SABELKO; ARIZONA
CIVIL LIBERTIES UNION,
Plaintiffs-Appellants,

v.

CITY OF PHOENIX; RICHARD C.
THOMAS, in his official capacity as
Public Transit Director for the
City of Phoenix; NEAL MANSKE,
in his official capacity as Deputy
Director, Phoenix Transit
Department, City of Phoenix;
TRANSPORTATION DISPLAYS, INC.
Defendants-Appellees,

and

ATC/VANCOM MANAGEMENT
SERVICES, INC.,
Defendant.

No. 97-16821

D.C. No.
CV-97-0138-SMM
OPINION

Appeal from the United States District Court for the District of Arizona Stephen M. McNamee, District Judge, Presiding

Argued and Submitted
March 12, 1998--San Francisco, California

Filed August 28, 1998

Before: Byron R. White,* Associate Justice, (Ret.), John T. Noonan and Sidney R. Thomas, Circuit Judges.

Opinion by Justice White; Dissent by Judge Noonan

WHITE, Associate Justice, (Ret.):

The issue presented in this appeal is whether there is a likelihood that limiting advertising on municipal buses to "speech which proposes a commercial transaction" violates the First Amendment. We hold that there is not a sufficient likelihood of a constitutional violation to justify the grant of a preliminary injunction and affirm the district court.

I

The city of Phoenix sells advertising space on the exterior panels of its buses for the purpose of raising revenue. Prior to November 1, 1996, the city's advertising standards prohibited advertising "support[ing] or oppos[ing] a candidate, issue or cause, or which advocates or opposes a religion, . .. or belief." Pursuant to this standard, the city rejected an advertisement submitted by plaintiff-appellant Children of the Rosary (COR) in September 1995. The proposed advertisement stated:

> "Before I formed you in the womb, I knew you" -- God Jeremiah 1:5 CHOOSE LIFE! [COR Logo] Children of the Rosary

The COR logo is a fetus surrounded by a rosary, which is connected to a cross at the top. On October 10, 1995, COR

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*The Honorable Byron R. White, Associate Justice of the United States Supreme Court, (Ret.), sitting by designation, pursuant to 28 U.S.C. S 294(a).

sued the city and obtained an injunction preventing the city from enforcing the standard against COR and requiring the city to display the COR advertisement.

On November 1, 1996, new advertising standards took effect. The new standards limited the subject matter of bus advertising to "speech which proposes a commercial transaction." On November 15, 1996, the city advised COR that its advertisement would not be displayed because the advertisement did not propose a commercial transaction. In response, COR submitted a revised advertisement for display on the exterior bus panels. The revised advertisement stated:

> "Before I formed you in the womb, I knew you" -- God Jeremiah 1:5 Purchase this message as a bumpersticker for your vehicle! Contact [phone number] [COR Logo] Children of the Rosary CHOOSE LIFE!

The city rejected COR's revised advertisement because, in the city's view, the primary purpose of the advertisement was not to propose a commercial transaction, but instead promote a noncommercial message.

Subsequently, plaintiff-appellant Arizona Civil Liberties Union (AzCLU) submitted its own advertisement for display on buses. Their advertisement stated:

> The ACLU Supports Free Speech for Everyone To purchase this bumper sticker please call [phone number]

The city rejected this advertisement because it did not comply with the new advertising standard.

On January 23, 1997, appellants filed suit against the city under 42 U.S.C. S 1983 in the United States District Court for

the District of Arizona alleging that the city's advertising standards violated the First Amendment.[1] On August 1, 1997, the district court denied appellants' application for a preliminary injunction. This appeal followed.

II

We have jurisdiction under 28 U.S.C. S 1292(a)(1). To obtain a preliminary injunction, a movant must show a likelihood of success on the merits and the possibility of irreparable injury or the existence of serious questions going to the merits and the balance of hardships tipping in the movant's favor. See Foti v. City of Menlo Park, 146 F.3d 629, 634 (9th Cir. 1998).

We review the denial of a preliminary injunction for abuse of discretion, and will find an abuse of discretion "where the district court `based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.' " Roe v. Anderson, 134 F.3d 1400, 1402 (9th Cir. 1998) (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990)); see MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 516 (9th Cir. 1993).

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[1]In addition to the city of Phoenix, appellants sued Richard C. Thomas, the city's Public Transit Director, Neal Manske, Deputy Director of the transit department, ATC/Vancom Management Services, Inc., a corporation that manages the transit system under a contract with the city, and Transportation Displays, Inc., a corporation that administers the placement of advertising on city buses in compliance with city standards. For convenience, we refer to the defendants collectively as the "city."

To prove a violation of 42 U.S.C.S 1983, appellants must establish that 1) the city acted under color of state law; and 2) the city deprived appellants of a right secured by the Constitution or laws of the United States. See Fred Meyer, Inc. v. Casey, 67 F.3d 1412, 1413 (9th Cir. 1995).

III

There are three primary issues we must address in determining whether the district court applied the correct First Amendment framework. First, we must properly classify the advertising panels under the Supreme Court's "forum approach" for assessing the validity of restrictions on the use of government property. See International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992) (ISKCON). Second, once we determine the type of forum at issue, we ascertain the relevant level of scrutiny for this forum. Finally, we must determine whether the city improperly applied this standard in rejecting the advertisements submitted by appellants.

A

The Supreme Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 800 (1985). Forum analysis divides government property into three categories: public fora, designated public fora, and nonpublic fora. A traditional public forum is a place "that has traditionally been available for public expression," such as a public park. ISKCON , 505 U.S. at 678. Neither party argues that a bus advertising panel is a traditional public forum. Instead, the parties debate whether the bus panel

is a designated public forum or a nonpublic forum.

A designated public forum is a nontraditional forum that the government has opened for expressive activity by part or all of the public. See Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46 & n.7 (1983). The creation of a designated public forum requires a decision "intentionally opening a nontraditional forum for public discourse." Cornelius, 473 U.S. at 802; see Arkansas Educational Television Comm'n v. Forbes, 118 S. Ct. 1633, 1641 (1998) (AETC). Hence, the Court has looked to the policy and practice of the government, the nature of the property and its compatibility with expressive activity, and whether the forum was designed and dedicated to expressive activities in determining if the government created a designated public forum. See Cornelius, 473 U.S. at 802-03; AETC, 118 S. Ct. at 1641.

In defining the relevant forum, the Court has "focused on the access sought by the speaker." Cornelius, 473 U.S. at 801. In this case, we agree with the district court that the relevant forum at issue is the exterior advertising spaces on the city's buses.

Appellants contend that the city created a designated public forum by opening up the exterior panels on buses for advertising by the general public. However, a review of the city's standards and practices indicates that the city has not opened a public forum. The city has consistently restricted political and religious advertising. See Excerpts of Record at 22 (affidavit of Public Transit Director). Although under its prior policy the city did accept some noncommercial advertising, such as public service announcements, only one percent of the advertisements displayed on the exterior of buses were noncommercial. See Excerpts of Record at 22 (affidavit of

Public Transit Director). The city submits that its current ban on noncommercial advertising supports a finding that the advertising panels are nonpublic fora.

The Supreme Court's decision in Lehman v. Shaker Heights, 418 U.S. 298 (1974), strongly supports our conclusion that the advertising panels are nonpublic fora. In Lehman, the Court upheld a ban on political advertising on public transit vehicles. The plurality opinion squarely rejected the argument that the advertising space on buses constituted a public forum protected by the First Amendment. Id. at 301-02. The Court noted that the city was engaged in commerce and had "discretion to develop and make reasonable choices concerning the type of advertising" it would display. Id. at 303. In our view, Lehman undermines appellants' claim that if a city has opened a property for communication, the property becomes a designated public forum. See Perry, 460 U.S. at 49 n.9 (noting that Postal Service v. Council of Greenburgh Civic Assns., 453 U.S. 114 (1981), reaffirmed Lehman's rationale for rejecting the argument that because an instrumentality is used for communication of ideas, it becomes a public forum).

However, appellants suggest Lehman is not persuasive authority. They assert that Lehman only concerns advertising inside a bus because Justice Douglas, who supplied the fifth vote for upholding the ban, based his concurrence on the fact that commuters were a "captive audience" who would be forced to view a partisan political message. This interpretation of his concurrence is far from clear. In Justice Douglas's view, the right of commuters to be free from forced intrusions on their privacy "preclude[d]" the city from transforming its buses into "forums for the dissemination of ideas upon this captive audience." 418 U.S. at 307. The reference to "captive audience" arguably suggests Justice Douglas was referencing commuters

inside a bus. However, read in context, his concern about forcing messages on a captive audience applies to observers on the street and commuters inside a bus. Justice Douglas wrote:

> I agree with Mr. Justice Brandeis who . . . said that the visual message in streetcars is no different [from other forms of communication imposed on a captive audience], for "[a]dvertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. . . . The radio can be turned off, but not so the billboard or street car placard."

418 U.S. at 307-08 (quoting Packer Corp. v. Utah , 285 U.S. 105, 110 (1932)). We reject appellants' invitation to narrowly interpret Lehman.[2]

Appellants also argue that we should not rely on Lehman because it was decided prior to the Supreme Court's adoption of its current approach to forum analysis in Perry. They claim that Lehman is inconsistent with subsequent Supreme Court decisions and provides little support for finding that the panels are nonpublic fora. We reject this argument. The Court relied upon and reaffirmed Lehman's rationale in Perry and subsequent cases, and there is no suggestion in the Court's

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[2]Appellants also claim that the issue presented in Lehman was limited to advertising inside transit vehicles. However, their claim is contradicted by Justice Brennan's dissent, which stated that the petitioner was denied access to exterior and interior advertising space pursuant to the city's prohibition on political advertising. 418 U.S. at 320 n.12.

jurisprudence that the advertising panels are properly classified as designated fora. See, e.g., Perry, 460 U.S. at 47 (relying on restriction upheld in Lehman to support the proposition that selective access does not transform government property into a public forum); ISKCON, 505 U.S. at 678 (Lehman reflects forum-based analysis and supports proposition that lower level of scrutiny applies when government acts as a proprietor); Cornelius, 473 U.S. at 803-04, 806, 808-09 (relying on Lehman to support, inter alia, propositions that "[n]ot every instrumentality used for communication . . . is a traditional public forum or a public forum by designation," and that a speaker may be excluded from a nonpublic forum if he wishes to address a topic not within the purpose of the forum); United States v. Kokinda , 497 U.S. 720, 725-26 (1990) (plurality opinion) (extensively quoting from Lehman and noting the lower level of scrutiny applied to the ban on political advertising); id. at 737 (relying on Lehman as stating the Court's "usual test for reasonableness" in a nonpublic forum); R. A. V. v. St. Paul, 505 U.S. 377, 390 n.6 (1992) (Lehman supports conclusion that there is "room" for "reasonable and viewpoint-neutral content-based discrimination in nonpublic forums"); see also Lebron v. National R.R. Passenger Corp., 69 F.3d 650, 657 n.3 (2d Cir. 1995), cert. denied, 517 U.S. 1188 (1996) (rejecting the same argument presented by appellants in this case and noting that "the Supreme Court has repeatedly reaffirmed a broader reading of Lehman, often specifically citing to the plurality opinion").

Thus, Lehman provides sufficient authority for concluding that the bus advertising panels are nonpublic fora. Our conclusion is also consistent with the reasoning of other circuits. See Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth., 767 F.2d 1225 (7th Cir. 1985); New

York Magazine v. Metropolitan Transit Authority, 136 F.3d 123 (2d Cir. 1998); see also Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth., 1998 WL 334830 (3d Cir. June 25, 1998). In Planned Parenthood, the Seventh Circuit concluded that advertising space on a bus system became a public forum where the transit authority permitted advertising on "a wide variety of commercial, public-service, public-issue, and political ads." 767 F.2d at 1232. The court distinguished Lehman because Lehman "upheld the blanket exclusion of an entire class of potentially controversial speech," while in Planned Parenthood the transit authority promulgated "no policy at all" with respect to the acceptance of advertising. 767 F.2d at 1233; see Christ's Bride Ministries, Inc., 1998 WL 334830, at *13, *16 (distinguishing Lehman where transit authority promulgated no policy governing removal of advertisements).

Similarly, in New York Magazine, the Second Circuit concluded that advertising space on the outside of buses was a public forum where the transit authority permitted "political and other non-commercial advertising generally." 136 F.3d at 130. The court found that the transit authority could not reject an advertisement based on a regulatory interest in upholding a law prohibiting the use of a person's name without their consent. Id. The court distinguished Lehman by arguing that

> disallowing political speech, and allowing commercial speech only, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in Lehman recognized as inconsistent with sound commercial practice.

Id.

This case is easily distinguished from the decisions of the Second and Seventh Circuits because the city of Phoenix consistently promulgates and enforces policies restricting advertising on its buses to commercial advertising. The city has not designated the advertising space on the exterior of its buses as a place for general discourse, and we therefore do not back away from our conclusion that the advertising space is a non-public forum.

B

In a nonpublic forum, the government has the "right to make distinctions in access on the basis of subject matter and speaker identity," Perry, 460 U.S. at 49, but "must not [make distinctions] based on the speaker's viewpoint," AETC, 118 S. Ct. at 1643. "The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." Perry, 460 U.S. at 49. The advertising standards "need only be reasonable;[they] need not be the most reasonable or the only reasonable limitation." ISKCON, 505 U.S. at 683 (internal quotations omitted). In addition, "[w]here the government is acting as a proprietor . . . its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject." ISKCON, 505 U.S. at 678 (citing Lehman and noting that the Court upheld the political advertisement ban "even though the city permitted other types of advertising" on the buses); see Kokinda, 497 U.S. at 726 (action of government acting in proprietary capacity is valid "unless it is unreasonable, or, as was said in Lehman, `arbitrary, capricious, or invidious.'").

The city sets forth four interests justifying the limitation on noncommercial speech: 1) maintaining a position of neutrality

on political and religious issues; 2) a fear that buses and passengers could be subject to violence if advertising is not restricted; 3) preventing a reduction in income earned from selling advertising space because commercial advertisers would be dissuaded "from using the same forum commonly used by those wishing to communicate primarily political or religious messages;" and 4) a concern that allowing COR's advertisement would violate the Establishment Clause. See Answer P 6.10. The district court concluded that each of the first three interests sufficiently supported the reasonableness of the revised standard. The court declined to address the Establishment Clause issue.

We agree with the district court that any one of the three interests supports the reasonableness of the city's standard. The city's interests in protecting revenue and maintaining neutrality on political and religious issues are especially strong. The Lehman court recognized that:

> [r]evenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and

> other public facilities would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.
>
> . . . .
>
> The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity.

Lehman, 418 U.S. at 304; see Cornelius , 473 U.S. at 809 ("avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum"); Lebron, 69 F.3d at 658 (upholding reasonableness of policy rejecting displays favoring any political view).

Appellants recognize that the plurality in Lehman "stated that the exclusion of noncommercial speech was justified by the city's asserted interest" in protecting its advertising revenue. Appellants' Opening Brief at 33. However, they argue that Lehman's low level of scrutiny is no longer valid in light of subsequent Supreme Court decisions. As we discussed in concluding that the panels were nonpublic fora, there is little authority to support this argument. We conclude that the city's ban on noncommercial advertising is reasonable in light of the interests asserted by the city.[3]

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[3]Appellants' argument that Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981), prohibits favoring commercial speech over noncommercial speech in bus advertising is rebutted by Metromedia's recognition that Lehman presented exactly that

C

The standard may still violate the First Amendment if it discriminates on the basis of viewpoint. Cornelius, 473 U.S. at 811. We must determine whether the city's standard is a permissible subject matter restriction or impermissible viewpoint discrimination, a distinction that "is not a precise one." Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 831 (1995). Viewpoint discrimination is a form of content discrimination in which "the government targets not subject matter, but particular views taken by speakers on a subject." Id. at 829; see General Media Communications, Inc. v. Cohen, 131 F.3d 273, 281 (2d Cir. 1997), cert. denied, 118 S. Ct. 2367 (1998).

Appellants first argue that even though the standard may have the facial appearance of neutrality, the standard is unconstitutional because the intent of the policy is to exclude religious and political speech. But we are dealing here with a nonpublic forum. The First Amendment does not prohibit the government from imposing content-based exclusions, as long as such are reasonable, which is the case here. Two of the reasonable exclusions are political and religious speakers in order to maintain neutrality. It is argued, however, that "[a]lthough the new Policy has abandoned the previous policy's language, it has not abandoned its goal." Appellants' Opening Brief at 23. The city certainly intended to reject political and religious speakers. But motive is not dispositive when there is no indication that the city is implementing the standard in a

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situation, and the Court's statement that it upheld the policy in Lehman because it involved a factual situation different from the regulation of billboards. Metromedia, 453 U.S. at 514 n.19 (plurality opinion).

viewpoint discriminatory manner that reflects an intent to use the policy to exclude disfavored perspectives on the issues.

The city's previous attempt at restricting access to the forum was struck down because it prohibited the expression of religious perspectives on issues while possibly permitting others to express their perspective. The city responded by enacting a general standard regulating access to the forum.

The city's current standard does not use political or religious controversy as the test for accepting advertising, but instead implements a neutral standard based on its desire to avoid jeopardizing revenue and the city's neutrality. See Lehman, 418 U.S. at 304 (limiting advertising to commercial advertising that is generally "innocuous and less controversial" does not violate the First Amendment); Lebron, 69 F.3d at 658-59.

Of course, a regulation that "is in reality a facade for viewpoint-based discrimination" is unconstitutional. Cornelius, 473 U.S. at 811. But "[a] facade for viewpoint discrimination . . . requires discrimination behind the facade." Grossbaum v. Indianapolis-Marin County Bldg. Auth., 100 F.3d 1287, 1298 (7th Cir. 1996). In Cornelius , the Court was concerned that a government ban on "advocacy groups" in a charity drive concealed a bias against a viewpoint expressed by an excluded group. The government argued that the advocacy organization was excluded from a government charity campaign based in part on the government's interest in limiting participation to groups providing direct services to indigent persons. However, the Court remanded the case because there was evidence that other organizations who did not provide direct services to the poor participated in the campaign, thus raising the possibility that the organization was excluded because of its viewpoint.

We do not have similar evidence in this case. Although the city has continued to honor pre-existing contracts involving noncommercial advertisements to avoid breach of contract claims, including the display of a COR advertisement, the city has not accepted new noncommercial advertisements. The district court carefully reviewed the details of each contract and advertisement proffered by appellants as evidence of discrimination, and concluded that the standard was not a facade for viewpoint discrimination. We find no error in the district court's findings that the noncommercial contracts were effective prior to the adoption of the new standard and that advertisements accepted after the standard took effect were commercial in nature.

We also reject appellants' argument, based on R. A. V. v. St. Paul, 505 U.S. 377 (1992), that the standard discriminates in practice against a viewpoint because it favors one side in a debate on public issues. R. A. V. struck down a criminal law that, among other things, prohibited displays that used certain words that would arouse anger in others on the basis of race, color, creed, religion, or gender. However, the law permitted displays containing the same words if the display did not invoke race or other classifications. Here, appellants do not explain how the city's standard prohibits one side of a debate from employing certain language or methods to express its view, while permitting the other side to use the same methods. Or, as the Court put it in R. A. V., the city is not permitting "one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." 505 U.S. at 392. Moreover, as compared to the applicable level of scrutiny when the government acts as a proprietor, the level of scrutiny is higher when the government is using its sovereign power to impose criminal penalties to deprive citizens of their liberty for expressing certain views.

Appellants claim that the standard might permit an advertisement for a family planning clinic that offers abortion services while barring messages opposing abortion, thus favoring one side of a debate. However, the city is merely requiring that an advertisement convey a commercial message. As in Lehman, the city is acting to prevent its advertising panels from becoming areas for the debate of political and religious issues with a resulting detrimental effect on the city's ability to attract long-term commercial advertising. "In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation." Lehman, 418 U.S. at 304.

D

Appellants also bring an as applied challenge, claiming that the city's rejections of their revised advertisements were viewpoint-based. The district court rejected the challenge, finding that the advertisements were "ideological communications" and the essential issue-oriented nature of the advertisements could not be changed to commercial advertisements by simply adding an offer to purchase a bumpersticker containing a political or religious message. We agree with the district court.

As an initial matter, we note that if appellants' challenge is successful, the reasoning of Lehman is hollow because a political advertising restriction could easily be avoided by tacking on a commercial offer to purchase the political message. For example, any candidate for political office could convert his political advertisement into a commercial advertisement by simply offering the message as a bumpersticker. This would significantly undermine the government's ability to act as a proprietor and control access to

a nonpublic forum, thereby forcing the government into "an all-or-nothing choice" where "it might not open the property at all." AETC, 118 S. Ct. at 1642.

The Court addressed a similar attempt to transform speech in Valentine v. Chrestensen, 316 U.S. 52 (1942). The petitioner in Valentine attempted to evade a restriction on commercial advertising by placing a protest against a city law on the back of a handbill containing a commercial advertisement. The Court rejected this attempt to convert a commercial advertisement into a public protest, concluding:

> that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance. If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command.

316 U.S. at 55. Although Valentine's holding that the First Amendment does not protect commercial advertising has not survived, see Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 420-21 (1993), the Court has continued to reject attempts to evade a regulation by appending a message aimed at transforming the speech.

In Board of Trustees of State Univ. of N. Y. v. Fox, 492 U.S. 469 (1989), the Court rejected another attempt to transform speech by combining commercial and noncommercial elements. The prohibition at issue in Fox banned the operation of commercial enterprises on state university campuses. Students challenged the prohibition on First Amendment grounds because they were unable to host

"Tupperware parties" to sell housewares. According to the students, the parties included presentations on "how to be financially responsible and how to run an efficient home." 492 U.S. at 474. Thus, the students asserted, the commercial and noncommercial speech were "inextricably intertwined" and must therefore be classified as commercial speech. The Court stated that the "level of First Amendment scrutiny must depend upon the nature of the speech taken as a whole and the effect of [any] compelled statement thereon." 492 U.S. at 474 (internal quotations omitted). The Court concluded that including the "home economics elements" did not convert the events into educational speech.

The district court did not err in finding that the proposed advertisements were noncommercial and the city did not engage in impermissible viewpoint discrimination. The Court has recognized that "there are commonsense differences between speech that does no more than propose a commercial transaction and other varieties." Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc. , 425 U.S. 748, 771 n.24 (1976) (internal quotations omitted); see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y., 447 U.S. 557, 562 (1980). In this case, the advertisements are not "expression[s] related solely to the economic interests of the speaker and its audience," Central Hudson, 447 U.S. at 561, but instead seek to blur the distinction between types of speech by blending an "ideological communication," Virginia Bd. of Pharmacy, 425 U.S. at 779 (Stewart, J., concurring), with an offer to purchase the message. When the government is acting as a proprietor in this nonpublic forum, the government may regulate this nonpublic forum by rejecting an advertisement combining political and religious advertisements with a commercial offer. The city did not apply the standard in a

viewpoint discriminatory manner by rejecting appellants' advertisements promoting their views on public issues.

IV

Appellants also argue with little elaboration that the standard is overbroad, underinclusive, and vague. Appellants claim that the standard is overbroad because its restrictions are greater than necessary to protect the city's interests. Appellants do not explain how the doctrine of overbreadth applies in this case. Indeed, they do not claim that the standard chills the speech of third parties or that others may not undertake to challenge the law. See Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987). Appellants fail to argue that there is "a realistic danger" of compromising the First Amendment rights of third parties and we find no merit in their facial overbreadth challenge. See Jews for Jesus, 482 U.S. at 574 (internal quotations omitted).

We also reject appellants' assertion that the standard is underinclusive because it does not ban commercial speech containing religious or political elements. Appellants reliance on City of Ladue v. Gilleo, 512 U.S. 43 (1994), to support their argument is misplaced. City of Ladue stated that a regulation may be underinclusive where it attempts to give one side of a debate an advantage or where the government seeks to control "the search for political truth." 512 U.S. at 51 (internal quotations omitted). Appellants do not argue in their underinclusive challenge that the city is giving an advantage to one side in a debate, and we rejected this argument in discussing whether the standard discriminates on the basis of viewpoint.

Finally, appellants argue that the standard is unconstitutionally vague in reliance on a concurring opinion in

Metromedia, 453 U.S. at 536-37, and a citation to that statement in Cincinnati v. Discovery Network, Inc. , 507 U. S. 410, 423 n.19 (1993). They claim that the standard presents a danger of discrimination against disfavored subjects in the guise of determining what is commercial speech. Their brief vagueness argument makes it difficult to determine if they claim that the standard is vague because it presents a danger of viewpoint discrimination, or is vague because it "contains no standard for guidance as to prohibited and allowable conduct." Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269, 1272 (4th Cir. 1986). To the extent appellants claim the standard is unconstitutional because of the discretion granted to the city, we reject this argument based on our discussion in previous sections.

If appellants are simply asserting that we should hold the standard unconstitutional because it is difficult to determine whether the "speech proposes a commercial transaction," we would reject the argument. First, we note that there is no fine or other penalty in this case if a person incorrectly classifies their advertisement: The city simply rejects the advertisement. This claim is unlike the usual vagueness challenge involving a fine or other sanction that has the potential to chill conduct. Cf. Jews for Jesus, 482 U.S. at 576 (unrestrained power to arrest). Second, we agree with the Fourth Circuit that the Supreme Court has provided sufficient guidance on the meaning of the standard. See Major Media, 792 F.2d at 1272. The city's standard goes beyond stating that commercial speech is allowed; the city enacted the Court's standard for identifying commercial speech.[4] "[T]he test for identifying commercial

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[4]Cf. Foti v. City of Menlo Park , 146 F.3d 629, 638-39 (9th Cir. 1998) (striking down on vagueness grounds a portion of an

speech" is whether the advertisement "propose[s] a commercial transaction." Fox, 492 U.S. at 473-74. The Fourth Circuit was not persuaded that the possible difficulty of applying the Court's guidance in a marginal situation was sufficient to declare a policy unconstitutionally vague:

> Although an occasional marginal case might arise raising the question of whether on the particular facts the definition of commercial speech would be correct, such an infrequent possibility should not in itself justify a generalized charge that the ordinance itself is vague, given the guidance afforded by court decisions in the area.

Major Media, 792 F.2d at 1272-73. We agree with the Fourth Circuit and reject appellants' vagueness challenge.

CONCLUSION

We AFFIRM the district court's denial of appellants' request for a preliminary injunction.

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ordinance banning signs displayed on vehicles only when the vehicle has been parked in a manner designed to attract attention). The statute in Foti was facially invalid because it required police officers to determine whether the driver intended to park the car for the purpose of displaying a sign and provided no standard to guide their discretion. Id. at 639 (citing Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972)). Here, by contrast, the city may only reject an advertisement if it fails to propose a legitimate commercial transaction, a standard which will leave it with relatively little discretion in accepting or rejecting advertisements for display.

AFFIRMED.

NOONAN, Circuit Judge, dissenting:

That commercial speech can be distinguished from non-commercial speech, that the government as proprietor can limit a non-public forum to commercial speech so that the government makes money, and that the sides of buses in Phoenix are meant to be such a forum, are propositions I accept. They do not remedy discriminatory application of the ordinance by the City of Phoenix.

The ordinance restricts advertising to "speech which proposes a commercial transaction." At first blush, it looks as though the standard must be good because it incorporates a hint from a dictum of the Supreme Court: "[t]here are commonsense differences between speech that does `no more than propose a commercial transaction,' . . . and other varieties." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976) (citation omitted). Advertisements for employment that do not express an opinion on social policy are "classic examples of commercial speech." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973). An advertisement that expresses opinion and seeks financial support for a political movement is not commercial. New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964). The distinction is tangible.

The distinction must be applied in the unique context of the medium of communication involved. Street car signs have been lumped with billboards as forming "a class by themselves." Packer Corp. v. Utah, 285 U.S. 105, 110 (1932) (Brandeis, J.); see also Lehman v. City of Shaker Heights, 418 U.S. 298, 307-08 (1974) (Douglas, J., concurring, relying on Justice Brandeis's opinion in Packer). Experience, however, has shown

each medium of communication to be unique. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981). The medium here is the exterior panels of city buses. Such panels are large -- not as big as big billboards but large enough so that figures on them are more than lifesize and the print on them shouts its message. Moving and grunting as they move, buses call attention to themselves. Stuck in traffic beside or behind a bus, the driver and passengers of a car cannot avoid taking in what confronts them. It is in their face. Similarly, pedestrians waiting for a light to turn cannot avert their eyes from what a waiting bus offers to view. The exterior panels are better than billboards in their ability to command consideration by those momentarily before them, and, unlike billboards, they move down central streets.

Not only is each medium of expression unique; the cultural context changes with the times. The context of a quarter of a century ago is not today's. We must apply precedents taking into account the context of contemporary culture. In this culture ideological conflicts exist in which the commercial side coincides with one of the two embattled positions. The commercial-non-commercial distinction should not be mechanically applied without attention to this distinct modern phenomenon.

As applied, the Phoenix ordinance bans a message that proposes a commercial transaction and, as an integral part of that proposal, identifies the product to be bought. What Children of the Rosary offers for sale is not something devised to evade the ordinance. As the record demonstrates, the bumpersticker was a good it sold prior to the ordinance's enactment. The American Civil Liberties Union offers a bumpersticker that, containing a message as to the ACLU's goals, effectively advertises the value of the ACLU as a

participant in the community. A nonprofit organization may surely sell products incidental to its mission and thereby both promote its goals and help to support itself. It is hard to see why Phoenix rejected the ACLU ad -- surely the message was uncontroversial -- unless the city was trapped into maintaining a consistent position on bumperstickers. It may be, as the majority suggests, that the ordinance would be porous if the sale of bumperstickers is not barred; but that suggestion only shows the deficiency of the ordinance as applied and the difficulty of governmental restraint of speech.

It is something of an anomaly in First Amendment jurisprudence for more protection to be accorded commercial speech than is accorded noncommercial speech. As Justice White has observed, such a result "inverts" the normal rule. Metromedia, Inc., 453 U.S. at 513. If the inversion is permitted by precedent, it still must be done in a way that does not destroy the level playing field of politics or put the government's seal of approval on one of two sides of a political issue. Moneymaking is not government's primary business. It would be ironic if pursuit of profit permitted a unit of government to discriminate in the messages on government property.

Here, the message of a group acknowledging the sacredness of human life in the womb is rejected; Planned Parenthood could run an ad for an abortion clinic. The views clash; the city of Phoenix would give space to one and not the other. Analogously, if Arizona should come to permit physician-assisted suicide as does Oregon, Dr. Kevorkian could advertise his services on the sides of the buses of Phoenix, but the counter advice of advocates offering free counselling against this course would be forbidden. The examples from the great life issues in our present culture speak for themselves. The

clash over the environment affords other examples. A power company could extol its product. The Sierra Club, objecting to more dams, would be denied the forum. The makers of a pesticide could celebrate their wares; champions of pesticide-free farms would be barred. A developer could tout the quality of his homes; defenders of green space in the suburbs would have to be silent on the buses. The pornographer could advertise his shop; the defenders of neighborhood decency would be denied a reply. In the America of 1998 to give the commercial advertiser space, without reference to the product being pushed, is for a city to take sides more than occasionally on issues of life and health and energy and the ecosystem.

The case is further complicated by the likelihood of commercial media using the buses to advertise their products. The record indicates that the city of Phoenix is ready to accept such advertisements. Commercial media advertising can be full of political or religious content. In this way a radio station in Phoenix, like a station in San Francisco, could advertise on the buses that it broadcasts Rush Limbaugh with a photo of the man accompanying the sales pitch. A Christian radio station could promote its product with a cross and a relevant message. A movie house could announce the return of The Last Temptation of Christ with an illustration of the Magdalen.

If the city of Phoenix is to be truly neutral on political and religious issues, it must go beyond the simplicity of "commercial" and be specific as to the content of commercial messages it will not accept. The city may, for instance, specify that the buses will not carry commercial messages on hot topics -- e.g., abortion, cigars and cigarettes, environmental disputes, euthanasia, pornography, radio talk shows, and X-rated movies. The city will have to discriminate frankly as to content, as it permissibly may in this commercial context. Such

content-based restrictions are permissible in such non-public fora. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983). What the city may not do is discriminate as to viewpoint, Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1643 (1998), as it did in this case where in the course of applying its ordinance it effectively rewrote it to permit only "primarily commercial" messages and thereby froze out even commercial advertising by nonprofit groups without significant business transactions to advertise.

Of the three rationales for the city's policy, the avoidance of violence against the buses seems to border on the absurd; nothing in the record substantiates the fear. The other two rationales -- neutrality on contentious political and religious matters and the maintenance of standards attractive to business advertisers -- would both be served by the kind of precision suggested here as essential to constitutionality. Neither rationale is served by a policy that allows the ideology of one side but not the other to be smuggled in.

The Phoenix ordinance, as applied, discriminates against the appellants' commercial speech and the Phoenix ordinance, as applied, fails to mark off a realm of ideology-free speech from a realm where ideologues with businesses to advertise can flourish. The preliminary injunction should have been granted.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OR ARIZONA

CHILDREN OF THE ROSARY, KATHERINE SABELKO, and ARIZONA CIVIL LIBERTIES UNION,
Plaintiffs,

v.

CITY OF PHOENIX, et al.,
Defendants.

Civ. 97-0138-PHX-SMM
MEMORANDUM OF DECISION AND ORDER

INTRODUCTION

On or about November 1, 1996, the City of Phoenix, a municipal corporation, adopted a new policy governing advertising on buses owned by the City and used by members of the public for public transportation in the greater Phoenix metropolitan area. Specifically, this policy provides, "[t] he subject matter of bus advertising shall be limited to speech which proposes a commercial transaction." Sabelko Decl. Ex. H,¶ 25; City of Phoenix Answer ¶ 5.16.

On March 20, 1997, Plaintiffs, the Children of the Rosary, Katherine A. Sabelko, and The Arizona Civil Liberties Union, filed suit seeking to have the foregoing Policy declared unconstitutionally violative of the First Amendment to the United States Constitution.

STANDARD OF REVIEW

The purpose of a preliminary injunction is to preserve the status quo among the parties pending the outcome of the action. Regents of the University of California v. A.B.C., Inc., 747

F.2d 511, 515 (9th Cir. 1974).

> To obtain a preliminary injunction, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. These formulations are not different tests but represent two points on a sliding scale in which the degree of irreparable harm increases as the probability of success on the merits decreases. Under either formulation, the moving party must demonstrate a significant threat of irreparable injury, irrespective of the magnitude of the injury.

Dr. Seuss Enterprises, L.P. v. Penguin Books U.S. A., Inc., 109 F.3d 1394, 1397, n.1 (9th Cir. 1997) (quoting Big Country Foods, Inc. v. Board of Educ., 868 F.2d 1085, 1088 (9th Cir. 1989( ); see also MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 516 (9th Cir. 1993); Gilder v. PGA Tour, Inc., 936 F. 2d 417, 422 (9th Cir. 1991).

DISCUSSION

1. Irreparable Harm

"It is undisputed that the loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). Thus, the irreparable harm part of the preliminary injunction test is satisfied and tips in favor of the Plaintiffs. See also Memphis Comm. School Dist. v. Stachura, 477 U.S. 299 (1986) (holding monetary recovery cannot compensate for injury to intangible rights guaranteed by the Constitution).

2. Likelihood of Success on The Merits for Plaintiffs' Facial Challenge

a. First Amendment Rights Are Clearly Implicated

Facially, the Advertising Policy at issue in this case purports to ban all non-commercial speech from the forum. In its Answer, the City of Phoenix admitted the facial ban on non-commercial speech is aimed at excluding "political" and "religious" speech from advertisement on City owned buses. Answer at ¶ 6.10. A governmental restriction targeting political and/or religious speech clearly implicates the constitutionally protected freedom of expression under the First Amendment to the United States Constitution. See, e.g., Rosenbergere v. Rector and Visitors of University of Virginia, 115 S. Ct. 2510, 2520 (1995); Boos v. Barry, 485 U.S. 312, 318 (1988). These facts are not disputed by the parties.

Given the Defendants Concession in its Answer, the Court interprets the City of Phoenix Bus Advertising Policy in two ways for the purposes of constitutional scrutiny. First, the Court reviews the Policy facially. That is to say, the Court reviews the constitutionality of the Policy that distinguishes on the basis of commercial and non-commercial speech. The Court also reviews the Policy in light of the unwritten Policy of interpretation admitted by the City in its Answer, namely that the Policy is designed to exclude political and religious speech. "[T] he fact that a policy is not committed to writing does not itself constitute a First Amendment violation," nor does it fail to constitute one. Lebron v. National R.R. Passenger Corp., 69 F.3d 650, 658 (2d Cir.), aff'd on reh'g, 74 F.3d 371 (2d Cir. 1995), cert. denied, 116 S. Ct. 1675 (1996).

b. The Forum That Is Implicated

The parties disagree as to whether the forum at issue in this case is a limited public forum or a nonpublic forum. The distinction is important because the level of judicial scrutiny to be applied to the challenged Policy depends upon the type of forum implicated. See, e.g., Frisby v. Schultz, 487 U.S. 474, 480 (1988).

i. The Three Types of Fora

The Supreme Court has identified three types of fora. The first is known as the traditional public forum and includes such places as public parks, open streets, and other areas open to the public which "have been immemorially held in trust for the use of the public, and, time out of mind, have been for purposes of assembly, communication of thoughts between citizens, and discussion of public questions." Id. at 480 (quoting Hague v. Committee for Indus. Org., 307 U.S. 496 (1939)). The traditional public forum is not implicated by the case at bar.

The second type of forum is known as the "designated" or "limited public forum." E.g., Rosenberger, 115 S. Ct. at 2516. It includes "public property which the State has opened for use by the public as a place for expressive activity." Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983); Kindt v. Santa Monica Rent Control Board, 67 F.3d 266, 269 (9th Cir. 1995). Limited public fora are fora such as school board meetings and municipal theaters where the government has intentionally - not by inaction or by permitting limited discourse - opened a nontraditional forum for public discourse. See Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985); Perry, 460 U.S. at 45-46.

The third and final type of First Amendment forum is known as the nonpublic forum. These are places "which [are] not by tradition or description a forum for public communication." Kindt, 67 F.3d at 269; see also Perry, 460 U.S. at 46. Essentially, any government property that is not either a traditional public forum or a designated public forum is considered a nonpublic forum. International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678-79 (1992) (holding inside of airport terminal was nonpublic forum).

The relevant inquiry in determining which type of forum is implicated in a case focuses on whether the government, in this case the City of Phoenix, has intentionally opened the forum "for use by the public as a place for expressive activity." Perry, 460 U.S. at 45. If the government has intentionally opened a forum for expressive activity, then the forum is a limited public forum; if it has not, the forum is a nonpublic one.

ii. City Buses Are Not Public Fora

Plaintiffs contend the exterior of City buses constitutes a limited public forum because "the City allows all members of the public to access this forum for expressive purposes." Plaintiff's Memorandum in Support of Application for Preliminary Injunction at 17. This is a factually incorrect statement. The Policy at issue does not open up City buses for all types of expression. Rather, it allows only advertisements that invite a commercial transaction.

It is perfectly permissible for the City to create a limited public forum certain purposes, but not to open the forum for others. See, e.g., Rosenberger, 115 S. Ct. at 2116-17. In fact, the Supreme Court has stated "speech which is constitutionally protected against state suppression is not thereby accorded a

guaranteed forum on all property owned by the state." Capitol Square Review & Advisory Board v. Pinette, 115 S. Ct. 2440, 2446 (1995). Under the limited public forum analysis, property remains a nonpublic forum as to all unspecified and/or excluded uses and need only be reasonable and viewpoint-neutral to pass constitutional muster. Deeper Life Christian Fellowship, Inc. v. Board of Educ., 852 F.2d 676, 679-80 (2d Cir. 1988) (citing Board of Airport Comm'rs of the City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 574-75 (1987); Cornelius, 473 U.S. at 802; Perry, 460 U.S. at 48). The Perry case is illustrative of this point.

In Perry, the Supreme Court found that the internal mail facilities of a school district were not a limited public forum because those who wished to use the mail system had to seek permission from each school principal. There was no evidence in Perry that such permission was routinely granted as a matter of course. "This type of selective access," the Court reasoned, "does not transform government property into a public forum." Perry, 460 U.S. at 47.

"The access sought by the speaker" identifies the relevant forum. Cornelius, 473 U.S. at 801. In the present case, the forum at issue can be described as the City of Phoenix's public bus transportation network, and, more specifically, the advertising spaces on the outside of these city buses. These buses are owned by the City of Phoenix and are operated under its control.

The interior of city-operated transit vehicles has been held to be a nonpublic forum. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). In Lehman, a candidate for state office sought to advertise his candidacy on buses in the City of Shaker Heights' transit system. While the City of Shaker Heights

allowed commercial advertisements and messages from public service groups to be placed in its buses, it refused to permit the display of political advertisements of any kind. The Supreme Court upheld this policy.

> We have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce . . . . The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed from its vehicles.

Lehman, 418 U.S. at 303.

In the Court's opinion, Lehman is highly instructional in the case at bar. While the exterior of buses is at issue in the present case, not the interior as was the case in Lehman, the reasoning in Lehman seems applicable to the exterior of buses in the present case due to the Lehman Court's emphasis on the City of Shaker Height's advertising policies as being part of a "commercial venture." Id. The City of Phoenix is "engaged in commerce" when it leases advertising space on the exterior of city buses just as the City of Shaker Heights was "engaged in commerce" when it leased space on the interior of city buses. Id. This commerce is merely "incidental to the provision of public transportation." Id.

The fact that the City of Phoenix is acting in a commercial venture means, although a governmental entity, it is acting as a proprietor rather than a regulator. "Where the government is

acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject." International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992) (upholding the government's refusal to allow a nonprofit religious corporation to solicit in the interior of an airport terminal because the government was acting as a proprietor facilitating passenger air travel).

Moreover, even when the government opens a nonpublic forum for some speech (as Phoenix did to commercial speech), the forum does not become a limited public forum if the government did to intend to open the forum without limitation. United States v. Kokinda, 497 U.S. 720, 730 (1990) (citing Cornelius, 473 U.S. at 802). Here, the limitation is stated in plain language directly in the Advertising Policy at issue. A court is not to find that a public forum has been created in the face of clear evidence of a contrary intent. Cornelius, 473 U.S. at 803. The inclusion of plain language of contrary intent in the very Policy challenged by the Plaintiffs is clear evidence that the City of Phoenix did not intend to create a limited public forum for the expression of all types of ideas. There is no policy or practice that demonstrates the City opened the advertising space on the side of City buses "for indiscriminate use by the general public." Hazelwood School Dist. v. Kuglmeier, 484 U.S. 260, 267 (1988). Accordingly, this Court holds that the buses owned and operated by the City of Phoenix constitute nonpublic fora.

This Court is not alone in holding that city transportation systems, although open to certain types of advertising, are not limited public fora. The Second Circuit Court of Appeals reached a similar conclusion in Lebron v. National R.R.

Passenger Corp., 69 F.3d 650 (2d Cir.), aff'd on reh'g, 74 F. 3d 371 (2d Cir. 1995), cert. denied, 116 S. Ct. 1675 (1996). In Lebron, the court concluded a large advertising display space mounted atop the interior of Penn Station in New York City was a nonpublic forum, or, at most, "a limited public forum for purely commercial speech." Accordingly, the court upheld a refusal to accept political advertisements as both reasonable and viewpoint-neutral. Id. at 658; see also Gannett Satellite Information Network, Inc. v. Metropolitan Transit Auth., 745 F.2d 767 (2d Cir. 1984); Christ's Bride Ministries, Inc. v. Southeastern Penn. Trans. Auth 937 F. Supp. 425 (E.D. Pa. 1996).

c. Reduced Scrutiny for Nonpublic Fora

Plaintiffs claim that "a content-based restriction (such as the City's Advertising Policy) is unconstitutional unless the City establishes that the [Policy] is 'necessary to serve a compelling state interest and that it is narrowly tailored to achieve that end.' " Plaintiffs' Memorandum in Support of Application for Preliminary Injunction at 20. That would be the case if a public forum or limited public forum were at issue, but since the Court has determined a nonpublic forum is at issue in the present case, a less stringent degree of scrutiny applies.

The constitutional standard governing speech regulations in nonpublic fora is somewhat unclear. The Supreme Court has elaborated on the standard in a number of cases over time, but the Court's language has not always been entirely consistent. The cases have unequivocally held that any speech regulation in a nonpublic forum must be "reasonable in light of the purposes served by the forum." Rosenberger, 115 S. Ct. at 2517; Lamb's Chapel v. Center Moriches Union Free School

Dist., 508 U.S. 384, 392-93 (1993); Cornelius, 473 U.S. at 806; Perry, 460 U.S. at 49. "The cases have been less definitive, however, regarding the neutrality standard that a nonpublic forum speech regulation must meet." Grossbaum v. Indianapolis-Marion County Bldg. Authority, 100 F.3d 1287, 1297 (7th Cir. 1996), cert. denied, 117 S. Ct. 1822 (1997).[1]

> In Postal Service v. Council of Greenburgh Civic Ass'ns, the Court said that such speech restrictions must be content-neutral. Id. In Perry and Cornelius, however, the Court shifted its focus to viewpoint discrimination and particularly to the intent to discriminate against specific viewpoints. The Court stated that a regulation must not be "an effort to suppress expression merely because public officials oppose the speaker's view," and similarly that a regulation must not be "in reality a facade for viewpoint-based discrimination." In its most recent cases, meanwhile, the Court has said that nonpublic forum regulations must be viewpoint neutral, making no mention of impermissible intent.

Id. at 1297 (internal citations omitted).

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[1] The difficulty in sorting through the holdings of various First Amendment cases and applying them to the specific facts raised in an individual case is illustrated by the number of appellate courts that have divided panels in such cases. For example, Lehman was a plurality opinion. Rosenberger was 5-4 decision, and two of the justices who voted with majority wrote special concurrences. Lebron was a 2-1 decision, as was Yeo v. Lexington, ___ F.3d ___, 1997 WL292173 (1st Cir. June 6, 1997) (discussed *infra*).

Having determined that city buses are nonpublic fora, and further having determined that the City of Phoenix is acting not as a regulator of speech or conduct, but rather as a proprietor under the facts and circumstances of the case at bar, this Court interprets the Supreme Court's precedent to mean that regulations against speech in the nonpublic forum that are not content-neutral may be constitutional so long as they do not discriminate on the basis of the viewpoint expressed. Accordingly, the City of Phoenix may restrain speech on its buses "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral." Kokinda, 497 U.S. at 730 (citing Cornelius, 473 U.S. at 806); see also Lamb's Chapel, 508 U.S. at 392-93.

d. The Restrictions Are Reasonable

"The reasonableness of the Government's restriction [on speech in a nonpublic forum] must be assessed in light of the purpose of the forum and all the surrounding circumstances." Cornelius, 473 U.S. at 809. The City has put forth four governmental interests in banning non-commercial speech on its buses:

(1) to maintain a position of neutrality on political and religious issues;

(2) a fear that allowing the exterior panels of City buses to be used for religious and political advertising may subject bus passengers and drivers to physical harm including death or serious personal injury, and may subject the buses themselves to an increased likelihood of property damage from acts of vandalism, sabotage, terrorism, or mob violence;

(3) that permitting the exterior panels on city buses to be used for non-commercial advertising purposes would reduce the City's income stream generated by this particular advertising medium by dissuading commercial advertisers from using the saying forum commonly used by those wishing to communicate primarily political or religious messages; and

(4) as to the plaintiff Sabelko's proposed advertisements, a concern that by allowing the display of that plaintiff's religious signs, it will send a message of endorsement in violation of

> the Establishment Clause of the United States Constitution.

Answer at ¶ 6.10.[2]

Given the lower level of scrutiny that applies to the constitutional review of restriction of freedom of speech in a nonpublic forum, the Court need not decide if any of the above stated reasons are "compelling" governmental interest. There need only be a reasonable governmental interest to support the City of Phoenix Policy at issue. See, e.g., Kokinda, 497 U.S. at 732-34. Without reaching the sufficiency of the fourth stated reason regarding the Establishment Clause, the Court finds each of the first three purported reasons offered by the City of Phoenix in support of its Policy banning non-commercial speech on city buses to be "reasonable" both individually, in their own right, and, alternatively, taken together as whole.

The Plaintiffs urged the Court at oral argument that none of the above-referenced reasons were "reasonable" within the constitutional framework of restrictions on speech in a nonpublic forum. The Court disagrees. Several of these justifications have been found to be "reasonable" by other courts that have considered similar cases. For example, the Supreme Court itself stated in Lehman that "there could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians." 418 U.S. at 304. The Lehman Court also voiced concern about the potential loss of revenue from other advertisers. The Second Circuit in Lebron, 69 F.3d at 658, held that "Amtrack's decision, as a proprietor, to decline to enter the

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[2] The advertisement is reproduced on page 38 of this Memorandum of Decision and Order.

political arena, even indirectly, by displaying political advertisements is certainly reasonable." The Eighth Circuit in Hubbard Broadcasting v. Metropolitan Sports found a refusal to allow public interest groups to advertise on the scoreboard at the Metrodome, determined by the court to be a nonpublic forum, reasonable in light of potential revenue loss from commercial vendors who might opt not to advertise in a similar forum. Hubbard, 797 F.2d 552, 556 (8th Cir.), cert. denied, 479 U.S. 986 (1986).

In International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992), the Court held the principal functions of an airport terminal did not include "promoting the free exchange of ideas," but rather was a commercial enterprise. Lee, 112 S. Ct. at 2707. The City of Phoenix's position with respect to its buses is analogous to that of the government in Lee. The principle function of the City's buses is to provide safe transportation, not to "promote the free exchange of ideas." Id.; see also Christ's Bride Ministries, Inc. v. Southeastern Penn. Trans. Auth., 937 F. Supp. 425, 431 (E.D. Pa. 1996) (stating "commuters use the bus transportation system to travel, not to debate.").

Consistent with its goals to provide safe public transportation services to commuters, the City of Shaker Heights had the discretion to develop and make reasonable choices concerning the types of advertising that may be displayed in its vehicles. The City of Shaker Heights' refusal to accept political advertising was held to be permissible under the First Amendment. Lehman, 418 U.S. at 303. The City of Phoenix has no less a right than the City of Shaker Heights to make policies regarding the type of advertisements it wishes to have displayed on its buses, especially in light of its stated,

reasonable goals offered in support of the Policy challenged in this lawsuit.

e. The Constitutionality of the Restrictions

Because subject matter discrimination is constitutional in nonpublic fora, see, e.g, Perry, 460 U.S. at 49, classifying a particular law or policy as a "subject" rather than as a "viewpoint on a subject" will justify discrimination against the viewpoint. This inherent malleability of the line between subject and viewpoint has forced courts to scrutinize carefully any content-based discrimination. See Air Line Pilots Ass'n v. Department of Aviation, 45 F.3d 1144, 1159-60 (7th Cir. 1995) (warning courts against retreating to an exaggerated level of generality when examining content-based regulations).

> Courts thus have struggled, for example, with the issue of whether religious discussion should be categorized as a subject (and therefore excludable from a nonpublic forum) or as a viewpoint (and therefore constitutionally protected). The Supreme Court faced a similar issue in Cornelius where it was understandably dubious of the argument that excluding all advocacy groups, regardless of political orientation, from a government charity drive was just subject matter discrimination rather than viewpoint discrimination. Because the government was distinguishing among groups based on the content of their messages (either advocacy or non-advocacy), the Court remanded the case to see whether the government was really targeting certain viewpoints.

Grossbaum, 100 F.3d at 1298. With these guidelines in mind, the Court must determine if the challenged City of Phoenix Policy is permissible content-based discrimination or impermissible viewpoint-based discrimination.

In Lehman, the key to the Supreme Court's determination that the City of Shaker Heights's policy was constitutional was that the policy was viewpoint-neutral. The policy did not ban only those advertisements supporting candidates from a particular political party or opposing a particular ballot initiative. The policy banned all political advertisements of any kind, regardless of the viewpoint expressed in them. Such a policy is said to be viewpoint-neutral although content-restrictive.

i. The City's Content-Based Restrictions Are Constitutional

The Plaintiffs assert that the content-based distinction between commercial and non-commercial speech in the case at bar is unconstitutional. In so arguing, they rely on cases such as Metromedia, Inc., v. San Diego, 453 U.S. 490 (1981), and Desert Outdoor Advertising v. City of Moreno Valley, 103 F. 3d 814 (9th Cir. 1996). Plaintiffs' reliance on Metromedia and cases in its progeny, however, is misplaced. Applying the holding of Metromedia, the Desert Outdoor court invalidated a city ordinance that imposed greater restrictions on non-commercial speech than on commercial speech. These ordinances were governmental restrictions on the display of private signs from private property. The City of San Diego in Metromedia and the City of Moreno Valley in Desert Outdoor were acting as regulators. As discussed above, however, the City of Phoenix is not acting in its governmental capacity as a regulator in the present case. Rather, it is acting as a proprietor in a commercial venture, and the City's regulations apply not to private signs on private property, but rather to its own proprietary advertising space. Lehman makes clear that when a governmental entity is acting as proprietor and not as regulator, content-based distinctions, so long as they are viewpoint-neutral, are permissible under the First Amendment.

The City of Phoenix's Policy is nearly identical, if not in form and substance, at least in spirit and interpretation, to the policy upheld by the Supreme Court in Lehman. Phoenix's Policy accepts commercial advertisements but refuses to accept advertisements that do not propose a commercial transaction, such as religious or political messages.[3] The City of Phoenix, therefore, has established a content-based restriction on advertisements on City owned and operated buses. The City of Phoenix has not established a policy that allows some forms of political advertisement and not others, nor has it established a policy that allows some types of religious advertisements and not others. It is a content-based but viewpoint-neutral policy that, according to the evidence submitted by the parties, has been consistently applied since its adoption. This Court holds such a policy does not violate the First Amendment to the United States Constitutions. Lehman, 418 U.S. at 303.

ii. The City's Restrictions are Viewpoint-Neutral

The Plaintiffs assert that because the intent of the City of Phoenix's Policy is to exclude political and religious speech, it is impermissibly viewpoint-based. The Court disagrees.

> Government regulation may not favor one speaker over another . . . . Discrimination against speech because of its message is presumed to be unconstitutional . . . .

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[3] At this juncture, the Court notes its analysis is on the City of Phoenix Policy as written since a facial challenge has been made to it. The Plaintiffs appear to have also made an "as applied" challenge by submitting evidence that the City's Policy is not followed and/or enforced consistently. Such arguments are not addressed in this section of the Court's Order, but rather in Section III.

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.

Rosenberger, 115 S. Ct. at 2516.

The City of Phoenix has a content-based restriction. But the City's Policy does not do what Rosenberger warns against. The City's Policy does not allow certain political advertisements and not others, nor does the Policy allow some religious advertisements and not others. It has not targeted "the particular views taken by speakers" with regard to political or religious speech. No matter what viewpoint may be espoused by potential non-commercial advertisers, their advertisements are banned when the subject matter, taken as a whole, fails to propose a commercial transaction. The Policy is therefore not viewpoint-based.

Plaintiffs urge the Court that the Supreme Court's decisions in Lamb's Chapel and Rosenberger require the Court to find the City of Phoenix's Policy is impermissibly viewpoint-based. The Court disagrees. In Lamb's Chapel, the Court struck down a regulation that barred the use of New York City public schools after school hours for religious purposes. The Court invalidated the policy stating:

> That all religions and all uses for religious purposes are treated alike under [the policy], however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint.

Lamb's Chapel, 508 U.S. at 393. It was clear in Lamb's Chapel that lectures or films about child-rearing and family issues were permitted under the policy since the policy permitted access for "social, civil, and recreational purposes." Id. at 391. Because the films the Lamb's Chapel plaintiff sought to show "dealt with a subject otherwise permissible" under the City of New York's policy, it was clear the only reason the plaintiffs were denied access to the forum was because their treatment of "otherwise permissible" subject matter was from a *viewpoint* that was not permitted - a religious one. Such viewpoint discrimination was held to be unconstitutional. Id. at 394.

The Rosenberger case was quite similar to the Lamb's Chapel case insofar as otherwise permissible content was banned because it was approached from a religious perspective. In Rosenberger, the plaintiffs were members of a student organization at the University of Virginia. The group was duly chartered and organized under the relevant University procedures. One of the group's activities was "to publish a magazine of philosophical and religious expression and to facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints." Rosenberger, 115 S. Ct. at 2515. Plaintiffs' organization sought funding for the publication of their magazine from the University's Student Activities Fund ("SAF"). The SAF was funded using monies from a mandatory student fee. Their request was denied. After exhausting their university-based remedies, they sought relief in federal court under 42 U.S.C. Section 1983. The Supreme Court declared the University's denial of funding for the plaintiffs' magazine to be unconstitutional. The Court found the University's denial was impermissibly based on viewpoint discrimination.

Central to the Supreme Court's reasoning was that funding was denied because of the Christian viewpoints expressed in the magazine. The magazine was not devoted to the advocacy of religion. In the magazines' first two issues, there were articles about racism, crisis pregnancy, stress, prayer, C.S. Lewis' ideas about evil and free will, homosexuality, Christian missionary work, and eating disorders. There were also music reviews and interviews with professors.

> By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in [the denial of the requested funds].

Id. at 2517. It thus appears to this Court that a critical feature in Rosenberger was the fact that topics of intellectual and social discourse, which are to be fostered in the University setting, had been denied the same abilities for student-funded publication and the robust debate that follows such publication because they were addressed from a religious viewpoint. Additionally, the University of Virginia was regulating the dissemination of ideas in print media vis-a-vis its SAF policy in Rosenberger. As stated above, Phoenix, in allowing commercial advertising on its city buses, is not acting as regulator but as a proprietor.

Unlike New York City in Lamb's Chapel or the University of Virginia in Rosenberger, the City of Phoenix does not disallow Plaintiffs' proposed advertisements because they

approach an issue from a Christian perspective. Rather, the Policy disallows all political and religious speech because they do not "propose a commercial transaction." Lamb's Chapel and Rosenberger are therefore inapposite.

iii. Alternative Channels for Communication

An additional consideration leading to the conclusion that the City of Phoenix's restrictions are "reasonable" is the availability of alternative channels for the Plaintiffs to communicate their non-commercial messages. See Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, 2380-81 (1995). Plaintiffs may use television, radio, and newspaper advertisements, as well as placards, handbills, and other types of communication in the public fora to spread their messages. Plaintiff Sabelko's Third Declaration in Support of the Application for Preliminary Injunction demonstrates that Plaintiffs' bumper sticker sales are an alternative forum for them to communicate their messages and that the business of disseminating their messages via this medium is alive and well. The City of Phoenix's Bus Advertising Policy leaves open all of these alternative avenues for Plaintiffs to communicate the messages they seek to disseminate, and many more. All the Policy does is prevent non-commercial advertisements from being communicated in a nonpublic forum.

iv. Conclusion on the Constitutionality of the Policy

For the reasons set forth above, the Court has determined the City of Phoenix's Policy is constitutional because, although content-based, it is both viewpoint-neutral and reasonable. Further, the Court finds there are alternative channels for Plaintiffs to communicate their messages. Accordingly, Plaintiffs have not met their burden in demonstrating a likelihood of success on the merits regarding their forum-based

challenge to the constitutionality of City's Bus Advertising Policy. The Application for a Preliminary Injunction on that basis is therefore denied.[4]

f. Facial Vagueness

Plaintiffs, invoking the third-party standing doctrine to make a facial challenge to the City's Policy, assert the Policy is unconstitutionally vague. At the outset, the Court notes that it is skeptical of a vagueness challenge to an advertising policy as opposed to a substantive law.

> Vagueness is concerned with the clarity of a law. A law must be drawn with sufficient clarity so that it informs people of the conduct they must take to avoid the sanction of the particular law. Under procedural due process, a statute is not constitutionally fair if it fails to give such information. However, an unclear statute may have First Amendment a well as procedural due process impact. A law regulating expression has to be especially clear because, if it is not specific, protected expression may be chilled or suppressed.

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[4] The Court's ruling regarding the constitutionality of the City of Phoenix's Bus Advertising Policy is, of course, based on its determination that a nonpublic form is at issue in the present case. If the Court erred in this regard, that is to say if a limited public forum were at issue in the present case, the Court has little doubt that the City's Bus Advertising Policy would not survive strict scrutiny constitutional analysis since it is not narrowly tailored to achieve the goals set forth by the City of Phoenix - goals which may or may not be compelling state interests under a strict scrutiny analysis.

Jerome A. Barron and C. Thomas Dienes, Constitutional Law 303 (West 1995) (hereinafter "Barron").

Given the purpose of the vagueness doctrine as explained by Professors Barron and Dienes above, it is questionable that the doctrine would apply to the present case since no law is at issue. There is no statute, ordinance, or judicial order that would subject a would-be speaker to any type of sanctions in the present case. Accordingly, it is nearly impossible to see how the City of Phoenix's Bus Advertising Policy could have a chilling effect on the free exercise of the one's free speech rights. At worst, someone who wished to place an advertisement on a City of Phoenix bus could submit an advertisement and have it rejected under the Policy. There is no sanction for such a rejection.

The above caveat having been made, the Court nonetheless examines the City's Policy for vagueness. Plaintiffs argue that the use of the phrase "speech that proposes a commercial transaction" in the City of Phoenix's Policy is unconstitutionally vague. A nearly identical argument was asserted in Major Media of the Southeast v. City of Raleigh, 792 F.2d 1269, 1272 (4th Cir. 1986), cert. denied, 479 U.S. 1102 (1987), in which the plaintiffs challenged an ordinance that failed to define "commercial" or "non-commercial" speech as unconstitutionally vague. Both the district court and the court of appeals held that sufficient guidance was given for such a distinction by various Supreme Court decisions relating to billboard and other commercial speech. The court cited the Supreme Court's decision in Central Hudson Gas & Elec. v. Public Servs. Comm'n, 447 U.S. 557, 561 (1980), which stated that commercial speech was "expression related solely to the economic interests of the speaker and its audience."

This Court finds the Major Media court's reasoning to be persuasive. To quote the Major Media court, "although an occasional marginal case might arise raising the question of whether, on the particular facts, the definition of commercial speech would be correct, such an infrequent possibility should not in itself justify a generalized charge that the [policy] is vague." Id. at 1272-73. The present case may be one of the "marginal cases" of which the Major Media court spoke raising particular facts that render the City of Phoenix's Policy as applied to the Plaintiffs unconstitutionally vague. Id. The Court, therefore, will undertake an "as applied" vagueness analysis in Section III of this Order. But the Court refuses to label the distinction between commercial and non-commercial speech unconstitutionally vague in light of prior Supreme Court precedent. See, e.g., Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 779-80 (1976) (defining commercial and non-commercial speech); Edenfield v. Fane, 507 U.S. 761 (1993) (same). Plaintiffs have thus failed to establish a likelihood of success on the merits under a facial vagueness theory, and their Application for Preliminary Injunction on that basis is denied accordingly.

g. Overbreadth

i. Overbreadth Generally

Plaintiffs also challenge the City's Policy as overbroad. Under the First Amendment overbreadth doctrine, regulations addressed to legitimate governmental concerns cannot "sweep unnecessarily broadly and thereby invade the areas of protected freedoms." N.A.A.C.P. v. Alabama, 377 U.S. 288, 307 (1964). The doctrine allows an individual whose own speech or conduct may be prohibited to challenge a statute on its face "because it also threatens others not before the court – those who desire to engage in legally protected expression but who

may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985).

The overbreadth doctrine, however, is to be used sparingly and only in rare circumstances. A law may be invalidated on its face under the doctrine only if the overbreadth is "substantial." Jews for Jesus, 482 U.S. at 574 (citing Houston v. Hill, 482, U.S. 451, 458-59 (1987); New York v. Ferber, 458 U.S. 747, 769; Broadrick v. Oklahoma , 413 U.S. 601, 615 (1973)). The requirement that the overbreadth be substantial arose from the Supreme Court's recognition that application of the overbreadth doctrine is, "manifestly, strong medicine" to be employed "sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. at 613. "There must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984). Barron, supra, at 304, explains the Court's rationale is due to the fact that it is rarely proper to invalidate a law based on possible, imagined applications of it in the future that may never arise.

Given the purposes of the overbreadth doctrine as discussed above, the Court questions whether the doctrine has any applicability to the present case because no law is being challenged. The very purpose of the doctrine is to allow someone to challenge a law on behalf of someone else not before a court who might otherwise freely exercise the right to engage in legally protected expression, but who refrains from doing so because of the "risk. [of] prosecution" if the expression is made. Brockett, 472 U.S. at 503. There is no threat of prosecution or threat of any other sanction in the

present case. At worst, one who desires to express himself or herself by advertising on City buses must seek an alternative forum for his or her message.

ii. Analysis Part 1: Other Persons' Chilled Speech

Even if the doctrine of overbreadth were applicable to the present case, the doctrine requires that there be a realistic danger that the proscription being challenged will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975); Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 462 n. 20 (1978). Plaintiffs have not met this burden.

While it is true, as Plaintiffs argue, that "a law is void on its face if it does not aim specifically at the evils within the allowable area of government control," see Plaintiffs' Memorandum in Support of Application for Preliminary Injunction at 39 (emphasis added), Plaintiffs consistently fail to see that there is no law at issue in this case. As with the vagueness doctrine, it is difficult to see how free speech could be chilled by the City's Policy due to fear of the imposition of a sanction.

The lack of any possible sanction that might chill otherwise protected free speech differentiates the present case from cases like Jews for Jesus and Tucker, two cases the Plaintiffs urged the Court to follow in terms of the applicability of the overbreadth doctrine to the facts of the present case. Neither case, however, convinces the Court that the "strong medicine" of the doctrine of overbreadth should be used to invalidate the City of Phoenix's Bus Advertising Policy. Broadrick, 413 U.S. at 613.

In Tucker v. State of Cal. Dept. of Educ.,97 F.3d 1204 (9th Cir. 1996), there was an order issued by the California Department of Education regulating the free speech rights of its employees. Violation of the order subjected the would-be offender to a sanction. Such is simply not the case with regard to the City of Phoenix's Bus Advertising Policy in the present case.

In Board of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987), the City of Los Angeles enacted a policy banning all First Amendment expression within the terminals of Los Angeles International Airport ("LAX"). The policy provided that "the City Attorney of the City of Los Angeles is directed to institute appropriate litigation against such individual and/or entity to ensure compliance with this Policy statement of the Board of Airport Commissioners." Id. at 571. In light of the possibility of a legal sanction, "a virtual 'First Amendment Free Zone'" at LAX was held to be unconstitutionally overbroad. Id. The overbreadth was substantial--"it prohibit[ed] even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually ever individual who enters LAX may be found to violate the resolution of engaging in some 'First Amendment activit[y].'" Id. at 575.

There is no chance of a similar chilling effect on free expression in the present case because there is no sanction. An advertisement that does not meet the City of Phoenix's Bus Advertising Policy is simply rejected, and other avenues of communication exist for the speaker to express his or her messages. Further, there can be no doubt that the Policy at issue in the present case does not create a "First Amendment Free Zone" as it does not affect people's ability to talk, read, or

otherwise exercise Free Amendment liberties the way the Policy in Jews for Jesus did. Id.

iii. Analysis Part 2: Proprietor in Nonpublic Forum

"A city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed from its vehicles." Lehman, 418 U.S. at 303. Accordingly, the Lehman Court upheld the City of Shaker Heights' policy banning political advertisements of all kinds as "reasonable" and did not declare the policy overbroad. Similar restrictions by governmental entities acting as proprietor rather than regulator that discriminated based on content using a commercial versus non-commercial basis have been upheld and were thus were not unconstitutionally overbroad. See, e.g., Lebron v. National R.R. Passenger Corp., 69 F.3d 650 (2d Cir.), aff'd on rehq, 74 F.3d 371 (2d Cir. 1995), cert. denied, 116 S. Ct. 1675 (1996); Gannett Satellite Information Network, Inc. v. Metropolitan Transit Auth., 745 F.2d 767 (2d Cir. 1984); Christ's Bride Ministries, Inc. v. Southeastern Penn. Trans. Auth., 937 F. Supp. 425 (E.D. Pa. 1996).

This Court has already determined that the City of Phoenix's Policy is a reasonable, content-based, viewpoint-neutral policy. The fact that there may be less restrictive means for the City to accomplish its stated interests in having adopted the Policy does not invalidate the Policy. "The government need not choose the least restrictive alternative when regulating speech in a nonpublic forum." Tucker, 97 F.3d at 1216. Reasonableness, not narrow-tailoredness, is what is required. E.g., Kokinda, 497 U.S. at 735-36. Plaintiffs have thus failed to establish a likelihood of success on the merits under an overbreadth theory, and their Application for Preliminary Injunction on that basis is denied accordingly.

h. Underbreadth

Plaintiffs assert, relying on City of Ladue v. Gilleo, 512 U.S. 43 (1994), the City's Policy is unconstitutionally under-inclusive. Specifically, Plaintiffs state:

> The City claims an interest in excluding controversial political and religious issues. However, as discussed above, much commercial speech is infused with political and religious elements. Yet, the policy does not ban commercial speech, let alone commercial speech containing religious or political elements.

Plaintiff's Memorandum in Support of Application for Preliminary Injunction at 41 (citations omitted).

While the Policy at issue very well may be under-inclusive, that does not render the City's Policy unconstitutional. Under-inclusiveness renders a law unconstitutional when "its exemptions discriminate on the basis of the . . . messages" such that the regulation of expression represents "a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people." Ladue, 512 U.S. 51 (citations omitted). The City of Phoenix's Bus Advertising Policy does not do this; it allows advertisements that propose a commercial transaction and disallows those that contain non-commercial speech (i.e., ideological communications).

Plaintiffs reliance on Ladue is misplaced. Ladue struck down a restriction on non-commercial speech at people's private residences. The City of Ladue was acting as a governmental entity restricting speech. Such is simply not the case here. Moreover, the Supreme Court in Ladue made

special comment of the fact that the City of Ladue was restricting freedom of speech in people's private residences -- a location that is afforded "special respect" for individual liberty. Ladue, 512 U.S. at 58 (citing Payton v. New York, 445 U.S. 573 (1980), and Spence v. Washington, 418 U.S. 405 (1974)). Plaintiffs' underbreadth challenge is therefore rejected, and their Application for Preliminary Injunction on the basis of underinclusiveness is denied accordingly.[5]

i. Establishment Clause

Plaintiffs further challenge the City of Phoenix Bus Advertising Policy as violative of the Establishment Clause of the First Amendment to the United States Constitution. Plaintiffs do so relying primarily on Rosenberger v. Rector & Visitors of the University of Virginia, 115 S.Ct. 2510 (1995), and Widmar v. Vincent, 454 U.S. 263 (1981). The Supreme Court in Rosenberger and Widmar held, inter alia, that it does not violate the Establishment Clause if the government grants equal access to a governmental forum if such access is done on a religion-neutral basis. The Plaintiffs argue that Rosenberger

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[5] Again, as with overbreadth, the Court also notes that other courts that have upheld restrictions on speech in the nonpublic forum based on a commercial versus noncommercial distinction did not hold that such a distinction was unconstitutionally underinclusive. See, e.g., Lebron v. National R.R. Passenger Corp., 69 F.3d 650 (2d Cir.), aff'd on reh'q, 74 F.3d 371 (2d Cir. 1995), cert. denied, 116 S. Ct. 1675 (1996); Gannett Satellite Information Network, Inc. v. Metropolitan Transit Auth., 745 F.2d 767 (2d Cir. 1984); Christ's Bride Ministries, Inc. v. Southeastern Penn. Trans. Auth., 937 F. Supp. 425 (E.D. Pa. 1996).

and Widmar also teach that governmental "exclu[sion of] religious expression impermissibly entangles the government with religion." Plaintiffs' Memorandum in Application for Preliminary Injunction at 44. The Court disagrees.

It was not the exclusion of religion as a topic that was found to be constitutionally impermissible in Rosenberger or Widmar. As discussed above, Rosenberger found the University of Virginia's decision not to fund the plaintiffs' magazine to be unconstitutional because

> the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.

Rosenberger, 115 S.Ct. at 2525

In Widmar, the Supreme Court held that a university which had created a wide-open and independent forum for registered student groups could not exclude those groups who sought to use the facilities for religious worship or discussion. The evidence indicated that but for the university's erroneous belief that allowing religious groups to use the facilities violated the Establishment Clause, the university possessed the clear intent to open its facilities to all student groups. Thus, it was not remaining neutral on religion as a topic, but rather the university had acted to suppress the expression of religious viewpoints in a forum it had otherwise intentionally created for student discourse.

The Policy challenged in the present lawsuit is quite different from Rosenberger and Widmar. Importantly, the Policy does not seek to suppress the expression of religious *viewpoints*; it bans non-commercial speech. While it is conceded the purpose of this ban is to prevent the City from being involved in the display of religious and political messages, the Policy accomplishes this end via a content-based, viewpoint-neutral policy. Perhaps more importantly, however, Rosenberger and Widmar addressed free speech concerns within the public forum/limited public forum framework. Equally important to this Court is the fact that the governmental actions in Rosenberger and Widmar were regulatory, not proprietary. Because the City of Phoenix is acting as proprietor, not regulator, in a nonpublic forum in the present case, Rosenberger and Widmar, although highly instructive, are not directly on-point.

The City argues it has a legitimate if not compelling governmental interest in avoiding the appearance of having endorsed the political and religious nature of the advertisement proposed by Plaintiffs Children of the Rosary and Katherine Sabelko.[6] The Court agrees. The core of the Establishment Clause is "the prohibition against governmental endorsement of religion preclud[ing] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." County of Allegheny v. A.C.L.U., 492 U.S. 573, 597 (1989) (holding a créche

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[6] The Plaintiffs' Establishment Clause challenge is presumably limited to the advertisement proposed by Plaintiffs Children of the Rosary and Sabelko because the advertisement proposed by the Arizona Civil Liberties United does not contain any religious message, only a political one.

displayed in a government building did have the effect of conveying a message of state-endorsed religion and therefore violated the Establishment Clause).

"[G]overnment inculcation of religious beliefs has the impermissible effect of advancing religion." Agostini v. Felton, 1997 WL 338583, *13. (U.S. June 23 1997). The City argues that allowing non-commercial speech (i.e., ideological communications) on City buses might give the appearance of government endorsement of the political and/or religious nature of the communication at issue in a non-commercial advertisement. The government has a legitimate interest, if not a compelling one, in seeking to avoid the appearance of governmental endorsement of religious messages. Allegheny, 109 S.Ct. 3100-05. The Court finds the case of Tucker v. State of California Dept. of Educ. to be instructive in determining whether the City's Policy offends the Establishment Clause. Tucker, 97 F.3d 1204 (9th Cir. 1996).

In Tucker, the Ninth Circuit struck down a California Department of Education policy banning the storage or display of any religious artifacts, tracks, information, and materials as violative of the First Amendment. Central to the court's reasoning was the fact that "reasonable persons are not likely to consider all of the information posted on bulletin boards or walls in government buildings to be government-sponsored or endorsed." Id. at 1215. Accordingly, a total ban on the posting of religious information of any kind in a nonpublic forum was held to be unreasonable. Id.

Unlike in Tucker, there is a very real concern in the present case that members of the public might find political or religious messages displayed on the side of City of Phoenix buses to be endorsed by the City. This case is therefore more analogous to

Monterey County Democratic Central Comm. v. U.S. Postal Serv., 812 F.2d 1194 (9th Cir. 1987) where the court upheld a ban on partisan political activity on the walkway area around a post office after determining the area at issue was a nonpublic forum. In distinguishing Tucker from Monterey, the Tucker court said of the Monterey case, "[t]here, we had reason to be concerned that the public might believe that the government endorsed the particular activity sought to be carried on. Here [in Tucker], that is simply not the case." Tucker, 97 F.3d at 1215.

The Court also finds the case of American Jewish Congress v. City of Beverly Hills, 65 F.3d 1539 (9th Cir. 1995), to be instructive. In that case, the Ninth Circuit directly addressed the issue of state endorsement of a religious message proposed for display on governmental property by a private group. The court summarized the facts as follows:

> Since 1986, Beverly Hills has allowed Chabad to erect a menorah in Beverly Gardens Park for approximately two weeks each year during the Chanukah season. The menorah is 27 feet tall and 24 feet wide, and weights 5,500 pounds. It is bolted to a permanent, concrete foundation that the City allowed Chabad to install in the park. Chabad covers the foundation with sod during the rest of the year. . . . The City does not fund the menorah or Chabad.

Id. at 1541. The American Jewish Congress filed a lawsuit arguing the display violated the Establishment Clause. There argument was, in part, based on the close proximity of Beverly Gardens Park to Beverly Hills City Hall. The Ninth Circuit reversed the entry of summary judgment on behalf of Beverly Hills finding that a genuine issue of material fact existed as to

whether a reasonable observer confronted with the Chabad display might identify the City as the menorah's sponsor.

The Court has already stated that it finds there is a genuine concern that allowing ideological communication of a political and/or religious nature on the side of City buses might be interpreted as endorsement by the City of Phoenix. At minimum, the Court concludes the decision in American Jewish Congress suggests that the resolution of that issue precludes the entry of summary judgement since a triable issue as to such endorsement exists. Accordingly, Plaintiffs have not met their burden showing a "likelihood of success on the merits" that would warrant the entry of a preliminary injunction on their Establishment Clause claim. Their Application for a Preliminary Injunction on that basis is denied accordingly.

3. Likelihood of Success on the Merits for Plaintiffs' As Applied Challenge

In addition to challenging the use phrase "speech that proposes a commercial transaction" as being generally vague, Plaintiffs also challenge the Policy as vague because, in some instances, it would be virtually impossible for a city administrator to make an intelligent decision regarding whether a particular proposed advertisement is or is not a permitted commercial advertisement. As an example, Plaintiffs point to one of the advertisements that Plaintiff Sabelko has attempted to submit, but the City has refused to accept.

Plaintiffs Children of the Rosary and Katherine Sabelko seek to place the following advertisement on Phoenix City buses:

Before I formed you in the womb, I knew you." - God
Jeremiah 1:5

Purchase this message as a bumbersticker
for your vehicle!
Contact 602-848-8031

LOGO Children of the Rosary CHOOSE LIFE!

The logo of the Children of the Rosary shows a fetus surrounded by a rosary that includes a cross.

Plaintiffs Arizona Civil Liberties Union seek to place the following advertising on Phoenix city buses:

The ACLU Supports Free Speech for Everyone
To purchase this bumper sticker please call 602-650-1967

Both of the above-reproduced advertisements were rejected by the City of Phoenix. Plaintiffs argue they both meet the facial requirements of the City's Bus Advertising Policy because they both propose a commercial transaction. The Court disagrees as both advertisements blend commercial and non-commercial speech.

The proposed advertisement submitted by Plaintiffs Children of the Rosary and Katherine Sabelko blends both a religious and political message with an invitation to purchase a bumper sticker of that same religious and political message; the one submitted by the Arizona Civil Liberties Union blends a political message with an invitation to purchase a bumper sticker of that same political message. In so combining the alleged commercial transaction (i.e., the purchase of the bumper sticker) with the religious and/or political messages, the Plaintiffs have purposefully attempted to blur the

distinction between commercial and non-commercial speech. Their attempt to so do, however, is unavailing.

In 1976, Justice Stewart referred to commercial speech as "commercial price and product advertising . . . confined to the promotion of specific goods and services" and non-commercial speech as "ideological communication." Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 750, 779-80 (1976). Four years later, the Court reaffirmed this definition when it said commercial speech was "expression related solely to the economic interests of the speaker and its audience." Central Hudson Gas & Elec. v. Public Servs. Comm'n, 447 U.S. 557, 561 (1980).

There can be no doubt that the message in the above-reproduced advertisements are "ideological communication [s]" in their most basic sense. Virginia Pharmacy Bd., 425 U.S. at 779-80. The proposed advertisements do not promote pricing or product advertising of "specific goods and services." Id. Nor are the proposed advertisements an "expression related solely to the economic interests" of the Plaintiffs and their intended audience. Central Hudson Gas, 447 U.S. at 561.

As far back as 1942, the Supreme Court rejected the intentional blurring of the lines between commercial and non-commercial speech within the context of a vagueness challenge in Valentine v. Chrestensen, 316 U.S. 52 (1942).[7] The plaintiff

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[7] The Court is mindful of the fact that Valentine was decided in a time when commercial speech was not given the constitutional protection it enjoys today. However, the rationale of the Court's opinion regarding attempts to transmute essentially one form of speech into another appears to be both sound and valid law.

in Valentine brought a former U.S. Naval submarine to a state pier in New York City to exhibit it for profit. He had printed a handbill advertising the submarine and soliciting visitors for a stated admission fee. When he attempted to distribute the handbill, he was advised by police that doing so on city streets violated a city ordinance prohibiting the distribution of handbills containing commercial and business advertising matter on city streets. He then prepared a double-faced handbill reproducing his advertisement on one side without the stated admission fee and placed non-commercial information on the other side that protested against the action of the city dock for refusing wharfage facilities at a city pier for the exhibition of his submarine. The Court concluded:

> That the affixing of the protest against official conduct to the advertising circular was with the intent and for the purpose of evading the prohibition of the ordinance. If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civil appeal or a moral platitude to achieve immunity from the law's command.

Id. at 55.

As with the merchant's handbills in Valentine, the essential nature of Plaintiffs' advertisements cannot be changed from religious and/or political in nature to commercial simply by the addition of an offer to purchase a bumper sticker containing the identical political and religious message. Plaintiffs' as applied vagueness argument is rejected accordingly.

4. Likelihood of Success on the Merits for Plaintiffs' Interpretation and Enforcement Challenge

Plaintiffs appear to argue that even if the City of Phoenix Bus Advertising Policy is not facially vague and, further, even if it is not vague as applied to Plaintiffs' two proposed advertisements, it has been rendered unconstitutionally vague due to the manner in which the City of Phoenix has interpreted and enforced the Policy. The Court disagrees.

Prior to the adoption of the current Policy, the City of Phoenix accepted and ran advertisements that did not promote a commercial transaction. Since the adoption of the new Policy, however, the City of Phoenix has not done so. The City honored contracts into which it entered prior to the adoption of the new Policy and continued to run such advertisements until the contractual obligations were fulfilled. The City has not, however, accepted new advertisements that are not commercial in nature since the adoption of the new Policy on November 1, 1996.

Plaintiffs assert that the following advertisements do not propose a commercial transaction: (1) Correctional Officer Career Opportunities with the Arizona Department of Corrections; (2) the Special Olympics of Arizona; (3) American Cancer Society message on mammogram testing; (4) an advertisement for the television show "The X Files"; (5) a "Zero Population Growth" message; (6) advertisements for the movies "Absolute Power" and "Gridlock'd"; and (6) the radio shows of G. Gordon Liddy, Michael Reagan, and Oliver North. See Plaintiffs' Memorandum in Application for Preliminary Injunction at 8.

The Court disagrees with the Plaintiffs that the above-referenced advertisements do not propose a commercial transaction. With the exception of the advertisement for "Zero Population Growth," which the Court will address in more detail later in this Order, all of the Other advertisements cited

to by the Plaintiffs are commercial under the Supreme Court's definition of commercial speech.

i. Movies, Television, and Radio Shows

As stated earlier, commercial speech is "commercial price and product advertising . . . confined to the promotion of specific goods and services" and non-commercial speech is "ideological communication." Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 750, 779-80 (1976). Advertisements for radio shows, television shows, and movies are commercial speech. An advertisement for a radio show, a television show, or a movie are promotions of that specific show or film. The advertisements are attempts to generate revenues for the show or movie being advertised by getting the public to become members of the audience for the show or movie. Such is at the very heart of commercial speech.

ii. Zoo and Museum Advertisements

The advertisements for the Phoenix Zoo and the Phoenix Art Museum are very similar to the advertisements for radio shows, television programs, and movies. They are promoting the Zoo and Museum respectively in an effort to get those who see the advertisements to become customers of the services they offer. And these services, notably although not dispositively, are offered in exchange for the payment of an admission fee. The Court has no problem finding such advertisements promote a commercial transaction. They are devoid of an "ideological communication" that would render them non-commercial speech. Virginia Pharmacy Bd., 425 U.S. at 779-80

iii. Public Service Advertisements

The advertisements for the Special Olympics of Arizona and the American Cancer Society move more into a gray area than the aforementioned advertisements. These advertisements are, in essence, public service announcements.

The American Cancer Society's advertisement shows the eyes of a women. Superimposed over the photo of the eyes appears the following:

"But what if they find something?"

Don't let the fear of knowing keep you from getting a yearly mammogram. There may well be nothing to find. But if there is a lump, a mammogram may detect it while it's still too tiny to be felt. And finding breast cancer very early may save your life.

GET A MAMMOGRAM, EARLY DETECTION IS THE BEST PROTECTION.
CALL 1-800-ACS-2345

The advertisement of the Special Olympics of Arizona advertisement has a picture of three boys in a huddle while holding a basketball. The bottom left of the advertisement has the logo for the Special Olympics and below the logo says, "Special Olympics of Arizona." The rest of the advertisement appears as follows:

Every Drop in The Bucket Counts.
[Photo] GIVE ON YOUR [Logo]
AZ TAX FORM

Both of the these advertisements do not, in the same way the other advertisements do, propose a commercial transaction. But that is not to say that they fail to propose a commercial

transaction *in toto*; they do. The American Cancer Society advertisement promotes the specific service of mammogram testing. The Special Olympics advertisement promotes donations to the Special Olympics - a charitable organization that depends upon the support of contributors.

There is an argument to be made that both of these are examples of commercial speech under the Supreme Court's decision in Central Hudson Gas &Elec. v. Public Servs. Comm'n, 447 U.S. 557, 561 (1980), because they are "expression [s] related solely to the economic interests of the speaker [s] and [their] audience [s]." Importantly, they do not contain any "ideological communication" that would transform the advertisements into non-commercial speech. Virginia Pharmacy Bd., 425 U.S. at 779-80. But recognizing the problems with so construing such public service advertisements, the City of Phoenix has discontinued contracting for new advertisements for public service advertisements since adopting its new Policy.

The Plaintiffs dispute the City's assertion and argue that the City has continued to run public service advertisements after the effective date of the new Policy. But the fact that such advertisements continued to be run after November 1, 1996 is a separate matter from whether new contracts were accepted. The City represented at oral argument on Plaintiffs' Application for the Preliminary Injunction that it has not accepted any new contracts for public service announcements after November 1, 1996. This assertion is confirmed by the sworn affidavit of Mr. Neil Manske, the Interim Public Transit Director for the City of Phoenix which states, "all of the advertisements [pointed out by Plaintiffs] were submitted to and approved for display on the exterior of city buses before November 1, 1996, the effective date of the City's new

advertising Policy with the exception of the . . . patently commercial advertisements . . ." Manske Affidavit at ¶ 16.

Plaintiffs points to the advertisements for St. Mary's Food Bank as evidence of the City's violation of its own Policy. But the contract with which the Plaintiffs take issues was entered into on October 8, 1996, nearly a month before the effective date of the new Policy. Since the effective date of the new Policy, the city has rejected advertisements by charitable organizations like St. Mary's Food Bank. See Affidavit of Neil Manske at ¶ 18. Similarly, Plaintiffs point to the public service announcements of the St. Vincent de Paul Society as further evidence of a violation of the City's Bus Advertising Policy. The contract date on this advertisement, however, is April 3, 1996, before the effective date of the new Policy.

The Court rejects the Plaintiffs' argument that the lack of a grandfather clause in the City's new Policy is fatal to the City's position. The City should not have to put itself at risk for multiple breach of contract claims to be brought against it because it changed its Bus Advertising Policy - something that all of the parties agree that City is undoubtedly free to do. The City's decision to run advertisements for which it contracted before the effective date of its new Policy and thus simply apply the new Policy to advertisements submitted after November 1, 1996, is eminently reasonable. And, the Court notes, the decision was uniformly enforced in a content-neutral, viewpoint-neutral manner. Thus, for example, the advertisements previously contracted between the City and Plaintiff Children of the Rosary were also permitted to be run after the effective date of the new Policy and the new

advertisements proffered after November 1, 1996 were rejected.[8] See Affidavit of Neil Manske at ¶ 17.

Finally, in this subcategory of public service announcements, the Court rejects Plaintiffs' contention that the advertisement for Paradise Valley Community College is an impermissible public service announcement because it fails to propose a commercial transaction. Although advertising for education might generically fall under the broad umbrella of a public service announcement, the advertisement is aimed at both the economic benefit of the College and its intended audience, namely that would-be students enroll in classes at the College and get an education in return. Importantly, it is devoid of "ideological communication." Virginia Pharmacy Bd., 425 U.S. at 779-80.

Plaintiffs have not demonstrated that the City has accepted new contracts (as opposed to continuing to honor previously executed ones) for public service announcements after the effective date of the new Policy.[9]

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[8] According to the arguments raised by the City at oral argument, and further according to the Affidavit of Neil Manske at ¶ 16, the identical analysis holds true to advertisements for Arizona Special Olympics, the American Cancer Society, Zero Population Growth, and the United Way.

[9] The Court notes that Plaintiffs have submitted a number of invoices that show the status of accounts after the effective date of the new Policy. The fact the invoices were signed for display dates after November 1, 1996 does not established that the advertisements which are the subject of those invoices were submitted, reviewed, and accepted in contravention of the new

iv. Zero Population Growth Advertisement

The Plaintiffs provided to the Court an advertisement for "Zero Population Growth." The advertisement has a black-and-white outline map of the world in the center of the banner. The text of the advertisement is as follows:

SMALLER FAMILIES ARE BETTER
FOR THE ENVIRONMENT

Mankind treats the Earth as if it were an unlimited resource . . . *it is finite.*

<map>

Uncontrolled population growth is the root cause of social, environmental, and political problems

Support Zero Population Growth
For more information call 1-800-767-1956

If the Zero Population Growth advertisement had been accepted after the effective date of the new Policy, it would be suspect given the City's Policy that accepts advertisements that only propose a commercial transaction with the intent to remain neutral in matters of religious and political controversy. The advertisement would be problematic because it is a mixture of commercial and non-commercial speech, just as Plaintiffs' proffered advertisements are. The request for support is, in a narrow sense, a proposed commercial transaction, just as Plaintiffs' offer to sell a bumper sticker is. But the essence of the Zero Population Growth advertisement is non-commercial. As with the Plaintiffs' proposed advertisements, it is inextricably linked with a political and/or religious message.

Policy after November 1, 1996.

The advertisement, without doubt, embodies an "ideological communication," Virginia Pharmacy Bd., 425 U.S. at 779-80, regarding sexual reproduction.

Had the Zero Population Growth advertisement been offered, reviewed, and accepted after November 1, 1996, Plaintiffs' vague as applies challenge, in light of interpretation and enforcement of the Policy, would be valid. But the Zero Population Growth advertisement was run in accordance with a contract entered into before the effective date of the new Policy. The Court finds, therefore, that no violation of the City's Policy occurred as a result of these advertisements being run through the end of the previously entered into contract period. Plaintiffs have not met their burden of showing a likelihood of success on the merits under a theory of selective interpretation and enforcement of the City of Phoenix Bus Advertising Policy. Their Application for a Preliminary Injunction on those grounds is therefore denied.

CONCLUSION

For the reasons set forth above, the Court finds (1) the advertising panels of the sides of City buses constitute a nonpublic forum; (2) the Advertising Policy adopted by the City of Phoenix and made effective November 1, 1996, is both reasonable and viewpoint-neutral, and thus withstands First Amendment judicial scrutiny of a restriction on speech in a nonpublic governmental forum; (3) the Policy is neither facially vague nor vague as applied with respect to the advertisements submitted by the Plaintiffs and rejected by the City in the present case; (4) the Policy is not unconstitutionally overbroad or unconstitutionally underinclusive; (5) the Policy, both facially and as interpreted and enforced, does not violate the Establishment Clause of the First Amendment to the United

States Constitution; and (6) the Policy has not been rendered vague as applied due to selective interpretation and enforcement.

The City of Phoenix ran many types of non-commercial advertisements under its old advertising policy. That policy was declared unconstitutional and the City adopted the Policy challenged in this lawsuit in place of the old one. This Court holds the new Policy is constitutional. Undoubtedly, though, further constitutional scrutiny of the Policy will be conducted in other courts. Reasonable people can differ on whether judges' opinions in this complex area of law are correct, as is evidenced by the numerous appellate panels and Supreme Court Justices who differ with each other when ruling on these matters. While judges strive to work their way through the complexities of the issues presented in a case such as this one, the public must wonder why First Amendment adjudication requires such extended and difficult analyses.

ORDER

IT IS THEREFORE ORDERED that Plaintiffs' Application for a Preliminary Injunction is hereby DENIED.

DATED this 1[st] day of August, 1997.

/s/
Stephen M. McNamee
United States District Judge

Copies to all counsel of record.

NOT FOR PUBLICATION [file stamp bearing date of Dec 7, 1998 omitted]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHILDREN OF THE ROSARY; KATHERINE A. SABELKO; ARIZONA CIVIL LIBERTIES UNION

Plaintiffs-Appellants,

v.

CITY OF PHOENIX; RICHARD C. THOMAS, in his official capacity as Public Transit Director for the City of Phoenix; NEAL MANSKE, in his official capacity as Deputy Director, Phoenix Transit Department, City of Phoenix; TRANSPORTATION DISPLAYS, INC.,

Defendants-Appellees,

and

ATC/VANCOM MANAGEMENT SERVICES, INC.,

Defendant.

No. 97-16821

D.C. No. CV-87-00138-SMM

ORDER

Before: White,*** Associate Justice, NOONAN and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion of rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*** Honorable Byron R. White, Retired Associate Justice, United States Supreme Court, sitting by designation.

[CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE]

[The First Amendment to the United States Constitution states:]

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

[The first section of the Fourteenth Amendment to the United States Constitution states:]

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

[Old Regulation]

5.4 Advertising Standards:

a. Advertisement deemed objectionable by the City's Public Transit Director or his designee shall not be used and shall be immediately removed by Contractor, at Contractor's sole expense.

The Public Transit Director in the past has directed the removal of advertising. The Director may direct the removal of advertising that cause public criticism or that is found offensive by: a) transit passengers(s); or (b) any member of the public. Such removal shall be at the Contractors' expense. The Contractor understands a partnership exists to make transit more attractive, more valued and more respected within the community and agrees to maintain high standards relative to advertising copy.

Furthermore, all full bus advertising graphic designs must be submitted in sufficient detail to determine content and final general appearance to PTS for review and approval before application.

b. The following standards for advertising have been adopted and advertising copy may not be displayed which:

(1) Is false, misleading or deceptive

(2) Relates to an illegal activity.

(3) Is explicit sexual material, obscene material, or material harmful to minors as these terms are defined in Title 13, Chapter 35, Arizona Revised Status.

(4) Advertises alcohol or tobacco produces

(5) Supports or opposes a candidate, issue or cause, or which advocates or opposes a religion, denomination, religious creed, tenet or belief.

(6) Depicts violence and/or anti-social behavior.

(7) Holds up individuals or groups of people to public ridicule, derision or embarrassment.

(8) Includes language which is obscene, vulgar, profane or scatological.

c. Advertisements of a public service nature from the City Public Transit Department, and PTS shall be subject to no posting fees.

d. PTS shall have the right to utilize all unsold advertising space at its sole discretion. All such space shall be subject to pre-emption for paying advertisers. PTS shall provide Contractor all advertising displays ready for installation on the buses. Contractor shall install the displays at no cost to PTS. In case of generic transit system advertisements used to fill unsold space, PTS shall provide all display copy and Contractor shall mount the copy and install or store the panels at no cost to PTS.

ADVERTISING STANDARDS

a. The City's Public Transit Director shall reject advertising that does not comply with the standards set forth in subparagraph (c).

   All full bus advertising graphic designs must be submitted in sufficient detail to determine content and final general appearance to PTS for review and approval before application.

b. The subject matter of bus advertising shall be limited to speech which proposes a commercial transaction.

c. The following standards for advertising have been adopted and advertising copy may not be displayed which:

   (1) Is false, misleading or deceptive

   (2) Relates to an illegal activity

   (3) Is explicit sexual material, obscene material, or material harmful to minors as these terms are defined in Title 13, Chapter 35, A.R.S.

   (4) Advertises alcohol or tobacco products

   (5) Depicts violence and/or anti-social behavior

   (6) Includes language which is obscene, vulgar, profane or scatological

   (7) Relates to instruments, devices, items, products or paraphernalia which are designed for use in connection with "specified sexual activities" as defined in the City of Phoenix Zoning Ordinance.

Supreme Court, U.S.
FILED
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No. 98-1433

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CHILDREN OF THE ROSARY, KATHERINE SABELKO, AND ARIZONA CIVIL LIBERTIES UNION,
Petitioners,
v.
THE CITY OF PHOENIX, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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228

QUESTION PRESENTED

Whether the First Amendment prohibits the City of Phoenix from adopting a policy under which it will sell advertising space on the outside of city-owned public transit vehicles only for messages that propose a commercial transaction.

PARTIES TO THE PROCEEDING

Under Rule 35.3 of the Rules of this Court, the parties to the proceeding identified in the petition for a writ of certiorari should be corrected in the following respects: Richard Thomas is no longer Public Transit Director for the City of Phoenix. Neal Manske is now Interim Transit Director for the City of Phoenix.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
STATEMENT	1
ARGUMENT	7
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: Page

AIDS Action Committee v. Massachusetts Bay Transportation Authority, 42 F.3d 1 (1st Cir. 1994) 15-16
Arkansas Educational Television Commission v. Forbes, 118 S. Ct. 1633 (1998) 12
Board of Trustees v. Fox, 492 U.S. 469 (1989) 6
Brandenburg v. Ohio, 395 U.S. 444 (1969) 12
Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority, 148 F.3d 242 (3d Cir. 1998), cert. denied, 119 S. Ct. 797 (1999) 15
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1983) 12
Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788 (1985) 3, 5, 8-9, 10, 11
Greer v. Spock, 424 U.S. 828 (1976) 8, 11
International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) 8, 10, 11
Lebron v. National Railroad Passenger Corp., 69 F.3d 650, on rehearing, 89 F.3d 39 (2d Cir. 1995), cert. denied, 517 U.S. 1188 (1996) 14
Lebron v. WMATA, 749 F.2d 893 (D.C. Cir. 1984) 14-15
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) ..... *passim*
Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 11
New York Magazine v. Metropolitan Transportation Authority, 136 F.3d 123 (2d Cir.), cert. denied, 119 S. Ct. 68 (1998) 14
Packer Corp. v. Utah, 285 U.S. 105 (1932) 9-10
Paulsen v. County of Nassau, 925 F.2d 65 (2d Cir. 1991) 14
Perry Educ. Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) 4, 8, 10, 11
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 8
U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983) 16

TABLE OF AUTHORITIES—Continued

Page

United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority, 163 F.3d 341 (6th Cir. 1998) 15
United States v. Kokinda, 497 U.S. 720 (1990) ..8, 10, 11
United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114 (1981) 8
Valentine v. Chrestensen, 316 U.S. 52 (1942) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1433

CHILDREN OF THE ROSARY, KATHERINE SABELKO, AND ARIZONA CIVIL LIBERTIES UNION,
Petitioners,

v.

THE CITY OF PHOENIX, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

1. The City of Phoenix sells advertising space on the outside of city buses "for the purpose of raising revenue." Pet. App. 2a. The City has explicit standards limiting the kinds of advertising that it will accept. For example, the City refuses to accept advertising that "[r]elates to an illegal activity" or that "[i]ncludes language which is obscene, vulgar, profane or scatological" (*id.* at 78a-79a, 80a). Before November 1, 1996, paragraph 5.4(b)(5) of the City's advertising standards also excluded advertising that "[s]upports or opposes a candidate, issue or cause, or * * * advocates or opposes a religion, denomination, religious creed, tenet or belief." Pet. App. 79a; see *id.* at 2a.

While this standard was in effect, petitioner Children of the Rosary (COR) submitted an advertisement that contained the COR logo—described by the court of appeals as "a fetus surrounded by a rosary, which is connected to a cross at the top" (Pet. App. 2a)—and the words "Before I formed you in the womb, I knew you'—God" followed by the legends "Jeremiah 1:5," "CHOOSE LIFE!," and COR's logo and name. *Ibid.* When the City rejected this proposed advertisement, COR sued and obtained an injunction requiring the City to display the advertisement. *Ibid.*

On November 1, 1996, the City modified its advertising standards. The new standards deleted the restriction previously contained in paragraph 5.4(b)(5). The new standards instead stated: "The subject matter of bus advertising shall be limited to speech which proposes a commercial transaction." Pet. App. 80a; see *id.* at 3a. In response to the new policy, COR submitted an advertisement containing the same text as the earlier advertisement, but this time inserting the words: "Purchase this message as a bumpersticker for your vehicle" and giving a telephone number. *Id.* at 3a. Petitioner Arizona Civil Liberties Union also submitted an advertisement, stating: "The ACLU Supports Free Speech for Everyone" and adding: "To purchase this bumper sticker please call 602-650-1967" (*id.* at 63a, 3a).

2. The City rejected both advertisements on the ground that they did not comply with the new standard. Petitioners then brought this suit in the United States District Court for the District of Arizona, alleging that the City's action violated the First Amendment. The district court denied petitioners' motion for a preliminary injunction. Pet. App. 28a-74a. The district court ruled, among other things, that "the advertising panels on the sides of City buses constitute a nonpublic forum"; that the City's ad-

vertising policy "is both reasonable and viewpoint-neutral"; that "the Policy is neither facially vague nor vague as applied with respect to the advertisements submitted by [petitioners] and rejected by the City"; and that "the Policy has not been rendered vague as applied due to selective interpretation and enforcement." *Id.* at 73a-74a.

3. a. The court of appeals, in an opinion by Justice White, sitting by designation, affirmed. Pet. App. 1a-23a. The court of appeals first concluded, as had the district court, that the advertising spaces on the outside of City buses constitute a "nonpublic forum" under this Court's decisions. *Id.* at 6a-11a. In particular, the court of appeals rejected petitioners' contention that the advertising spaces are a "designated public forum." The court of appeals explained that "[t]he creation of a designated public forum requires a decision 'intentionally opening a nontraditional forum for public discourse'" (*id.* at 6a, quoting *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 802 (1985)). The court of appeals concluded that "a review of the city's standards and practices indicates that the city has not opened a public forum." Pet. App. 6a. In particular, the court noted, "[t]he city has consistently restricted political and religious advertising." *Ibid.*

The court of appeals further reasoned that this Court's decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), "strongly supports our conclusion that the advertising panels are nonpublic fora." Pet. App. 7a. The court of appeals noted that the plurality opinion in *Lehman* "squarely rejected the argument that the advertising space on buses constituted a public forum protected by the First Amendment." *Ibid.*, citing *Lehman*, 418 U.S. at 301-02. The court of appeals then rejected petitioners' arguments that *Lehman* should be read to apply only to the interior of buses (Pet. App. 7a-8a & n.2) and that

Lehman had been discredited by subsequent cases (Pet. App. 8a-9a). In fact, the court of appeals noted, this Court "relied upon and reaffirmed *Lehman*'s rationale in *Perry* [*Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983)] and subsequent cases, and there is no suggestion in the Court's jurisprudence that the advertising panels are properly classified as designated fora." Pet. App. 8a-9a (italics added). The court of appeals also considered, and rejected, petitioners' argument that its conclusion was inconsistent with the holdings of other courts of appeals. *Id.* at 9a-11a.

b. The court of appeals stated that in a nonpublic forum, the government may " 'make distinctions in access on the basis of subject matter and speaker identity' " (Pet. App. 11a, quoting *Perry*, 460 U.S. at 49), so long as the distinctions " 'are reasonable in light of the purpose which the forum at issue serves' " (Pet. App. 11a, quoting *Perry*, 460 U.S. at 49) and do not discriminate on the basis of the speaker's viewpoint. Pet. App. 11a.

The court of appeals first addressed the question whether the City's reasons for limiting advertisements on buses were sufficient. Again agreeing with the district court, the court of appeals ruled that at least three of the interests advanced by the City were sufficient: the interest in "maintaining a position of neutrality on political and religious issues"; the concern that "buses and passengers could be subject to violence if advertising is not restricted"; and the need to "prevent[] a reduction in income earned from selling advertising space because commercial advertisers would be dissuaded 'from using the same forum commonly used by those wishing to communicate primarily political or religious messages' " (Pet. App. 11a-12a (quoting Answer ¶ 6.10)). The court of appeals stated that the "interests in protecting revenue and maintaining neutrality on political and religious issues

are especially strong" (Pet. App. 12a) and had indeed been approved in both *Lehman* and *Cornelius v. NAACP Legal Defense and Education Fund, Inc., supra* (*id.* at 12a-13a, citing *Lehman*, 418 U.S. at 304, and *Cornelius*, 473 U.S. at 809). The court of appeals accordingly concluded that the City's policy "is reasonable in light of the interests asserted" (Pet. App. 13a).

The court of appeals then rejected petitioners' argument that the City had discriminated on the basis of viewpoint. Pet. App. 14a-20a. The court first considered petitioners' argument that the policy was somehow rendered invalid by the City's statement that the policy was intended to exclude religious and political speech. The court of appeals explained that there is nothing improper about an intent to exclude speech with a certain content from a nonpublic forum so long as the City was not discriminating against particular viewpoints (*id.* at 14a-15a) and so long as the exclusions were reasonable, "which is the case here[: t]wo of the reasonable exclusions are political and religious speakers in order to maintain neutrality." *Id.* at 14a.

The court then specifically affirmed the district court's findings that the City, in administering the policy, had not discriminated on the basis of viewpoint. Pet. App. 16a. The court explained that "[a]lthough the city has continued to honor pre-existing contracts involving noncommercial advertisements to avoid breach of contract claims * * * the city has not accepted new noncommercial advertisement." *Ibid.* The court of appeals concluded (*ibid.*):

> The district court carefully reviewed the details of each contract and advertisement proffered by [petitioners] as evidence of discrimination, and concluded that the standard was not a facade for viewpoint discrimination. We find no error in the district

court's findings that the noncommercial contracts were effective prior to the adoption of the new standard and that advertisements accepted after the standard took effect were commercial in nature.

Finally, the court of appeals rejected petitioners' argument that the policy had been unconstitutionally applied to their advertisements. The court of appeals endorsed the district court's "finding that the advertisements were 'ideological communications' and the essential issue-oriented nature of the advertisements could not be changed to commercial advertisements by simply adding an offer to purchase a bumpersticker containing a political or religious message." Pet. App. 17a. The court of appeals noted that this Court has, on several occasions, "reject[ed] attempts to evade a regulation [of commercial speech] by appending a message aimed at transforming the speech" into noncommercial speech. *Id.* at 18a, citing *Valentine v. Chrestensen*, 316 U.S. 52 (1942), and *Board of Trustees v. Fox*, 492 U.S. 469 (1989). The court of appeals explained that if petitioners' argument on this point were to prevail, "the reasoning of *Lehman* [would be] hollow because a political advertising restriction could easily be avoided by tacking on a commercial offer to purchase the political message." Pet. App. 17a (italics added).

c. Judge Noonan dissented. Pet. App. 23a-27a. He explicitly conceded, however, that "the government as proprietor can limit a non-public forum to commercial speech" and that "the sides of buses in Phoenix are meant to be such a forum" (*id.* at 23a). Judge Noonan suggested that the basis of his dissent was "discriminatory application of the [standard]" by the City. *Ibid.* Judge Noonan did not, however, question the district court's findings, upheld by the majority, that the City applied the standard in a nondiscriminatory fashion. Rather, Judge Noonan emphasized that limiting the advertising space to

messages proposing a commercial transaction might have the effect of allowing, for example, "a power company [to] extol its product" while "[t]he Sierra Club, objecting to more dams, would be denied the forum." *Id.* at 26a. Judge Noonan suggested that in order to maintain neutrality, the City should "discriminate frankly as to content," specifying, for example, "that the buses will not carry commercial messages on hot topics" (*ibid.*).

The court of appeals rejected a suggestion of rehearing en banc, with no judge requesting a vote. Pet. App. 75a-76a.

ARGUMENT

The court of appeals' decision is a straightforward, and plainly correct, application of well-established principles. The decision in no way conflicts with the decision of any other lower court. Further review is therefore unwarranted.

1. In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), this Court upheld a municipal policy that barred "political [and] public issue advertising" from "car cards" on public transit vehicles while accepting "commercial and service oriented advertising." *Id.* at 301, 299, 304 (plurality opinion). Justice Blackmun's opinion for four Justices explained the reasons for the municipal policy (*id.* at 304):

> Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians.

Although there was no opinion for the Court in *Lehman*, Justice Blackmun's plurality opinion has—as Justice White

noted in his opinion for the court of appeals (Pet. App. 8a-9a)—been treated as authoritative by this Court many times since *Lehman* was decided. See, *e.g.*, *International Society for Krishna Consciousness, Inc. v. Lee* [*ISKCON*], 505 U.S. 672, 678 (1992); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992); *United States v. Kokinda*, 49 U.S. 720, 725 (1990) (plurality opinion); *Cornelius*, 473 U.S. at 801, 803-04, 806, 808-09; *Perry*, 460 U.S. at 47, 49 n.9; *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 129, 130 n.6 (1981).

This case represents a straightforward application of the repeatedly-reaffirmed principles of *Lehman*. Like the municipality in *Lehman*, the City of Phoenix has consistently "limit[ed] access to the advertising spaces on city transit buses." *Cornelius*, 473 U.S. at 803, citing *Lehman*, 418 U.S. at 299-300. Petitioners explicitly concede this point. See Pet. 9 ("In managing the transit display spaces, the City of Phoenix has always objected to the presentation of political and religious messages thereon and prohibited such messages from being displayed.").[1] Like the municipality involved in *Lehman*, the City of Phoenix "is engaged in commerce" (418 U.S. at 303; see Pet. App. 34a) and leases advertising space "for the purpose of raising revenue" (*id.* at 2a). Phoenix has offered the same justifications for its policy that this Court accepted in *Lehman* and subsequent cases. See, *e.g.*, *Cornelius*, 473 U.S. at 809, citing *Lehman*, 418 U.S. at 304, and *Greer v. Spock*, 424 U.S. 828, 839 (1976)

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[1] The record shows that even before the adoption of the new policy, only about 1% of the total number of advertisements displayed on City buses was non-commercial (Affidavit of Neal Manske, E.R. 22, § 8). No candidate for political office had ever been allowed to use the exterior panels on City buses to advertise his or her campaign. *Id.* ¶ 9. ("E.R." refers to the excerpts of record filed with the court of appeals.)

("[A]voiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum"). Indeed, if anything, the Phoenix policy, which limits advertising to messages that "propose[] a commercial transaction," is even more clearly defined than the policy at issue in *Lehman*, which referred more vaguely to "[p]olitical advertising" (418 U.S. at 300 n.1).

Petitioners attempt to distinguish *Lehman* on the ground that it concerned advertising only on the inside, not on the outside, of rapid transit vehicles. See Pet. i, 13-14. Petitioners suggest that a concern for " 'captive audiences' " animated the Court in *Lehman* and that this concern is "[u]nwarranted" when advertising appears on the outside of vehicles. See Pet. 13. But as Justice White pointed out in his opinion for the court below, the facts of *Lehman* itself involved advertising on both the inside and the outside of public transit vehicles. Pet. App. 8a n.2, citing *Lehman*, 418 U.S. at 320 n.12 (Brennan, J., dissenting). Moreover, as the court of appeals also noted, the logic of the "captive audience" argument advanced by members of the Court in *Lehman* applies to advertising on the outside, not just the inside, of a vehicle (Pet. App. 8a, quoting *Lehman*, 418 U.S. at 307-08 (Douglas, J., concurring) (quoting *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932)); brackets in original):

> I agree with Mr. Justice Brandeis who . . . said that the visual message in streetcars is no different [from other forms of communication imposed on a captive audience], for "[a]dvertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. * * *"

See also *Lehman*, 418 U.S. at 302 (plurality opinion), quoting *Packer Corp.*, 285 U.S. at 110: "[V]iewers of billboards and streetcar signs ha[ve] no 'choice or voli-

tion' to observe such advertising and ha[ve] the message 'thrust upon them * * *.'" Indeed, Judge Noonan's *dissenting* opinion in the court of appeals eloquently described the seriousness of the captive audience concerns created by exterior advertising on public transit vehicles (Pet. App. 24a):

> Moving and grunting as they move, buses call attention to themselves. Stuck in traffic beside or behind a bus, the driver and passengers of a car cannot avoid taking in what confronts them. It is in their face. Similarly, pedestrians waiting for a light to turn cannot avert their eyes from what a waiting bus offers to view. The exterior panels are better than billboards in their abiilty to command consideration by those momentarily before them, and, unlike billboards, they move down central streets.

Petitioners' suggestion that *Lehman* can be distinguished because this case involves the outside of buses is, therefore, far too insubstantial to warrant review by this Court.

Unable to distinguish *Lehman*, petitioners argue that the Court should "reconsider[]" the holding of that case. Pet. 14; see Pet. i. But petitioners do not identify so much as a single passage in any of this Court's opinions that draws into question the holding of *Lehman* or the logic of the plurality opinion in that case. On the contrary, the Court's subsequent cases repeatedly cite the plurality opinion in *Lehman* as an exemplar of how "forum" analysis is to be applied. See, *e.g.*, *ISKCON*, 505 U.S. at 678; *Kokinda*, 497 U.S. at 725-26 (plurality opinion); *Cornelius*, 473 U.S. at 803-04; *Perry*, 460 U.S. at 49 n.9.

2. Petitioners' other contentions are also plainly mistaken.

a. Citing the plurality opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981)—written by Justice White—petitioners argue (Pet. 9-11) that the City's policy amounts to a "constitutional inversion" (*id.* at 11) because it allows commercial but not political advertisements on its buses. But in *Metromedia* the government was acting as a regulator, restricting the rights of private parties to use their property for speech. By contrast, here, as in *Lehman*, the government is acting as a proprietor, deciding what speech to allow on its own property. The *Metromedia* plurality explained this point, citing and distinguishing *Lehman*. 453 U.S. at 514 n.19; see Pet. App. 13a n.3.

"Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as lawmaker may be subject." *ISKCON*, 505 U.S. at 678; see also *Kokinda*, 497 U.S. at 725-26 (plurality opinion). In keeping with this principle, the Court, in cases dealing with government-owned property, has repeatedly upheld content-based restrictions that prohibit certain forms of political or high-value speech while allowing the property to be used for other speech. See *Cornelius*, 473 U.S. at 797-800, 808-12; *Perry*, 460 U.S. at 44, 47; *Greer v. Spock*, 424 U.S. at 831, 838 n.10.

b. Petitioners also renew their somewhat puzzling contention (Pet. 11-12) that the City's policy is invalid because the City's "admitted purpose [was] to exclude political and religious expression from its transit display spaces." Pet. 11. As the court of appeals explained, there is simply nothing improper about such a purpose, when the City is limiting access to a nonpublic forum and is doing so in a way that is reasonable and viewpoint-neutral. In such circumstances, the City is entitled to

adopt a policy of excluding speech on the basis of its content. See, *e.g.*, *Arkansas Educational Television Commission v. Forbes*, 118 S. Ct. 1633, 1643 (1998); *Cornelius*, 473 U.S. at 800.

c. Petitioners also quote at length Judge Noonan's argument that the City's policy has the effect of allowing some points of view to be expressed more readily than others. See Pet. 8, quoting Pet. App. 25a-26a. (For example, " '[t]he makers of a pesticide could celebrate their wares; champions of pesticide-free farms would be barred.' " *Ibid.*) The same argument was made by the dissent in *Lehman*. See 418 U.S. at 317 & n.10 (Brennan, J., dissenting). Petitioners suggest no reason why this argument should be more successful now than it was in *Lehman*, especially when *Lehman* has now become an even more solidly entrenched part of the First Amendment doctrine governing the regulation of speech on government property.

Nearly every permissible content-based restriction of speech—and many permissible content-neutral restrictions —will have viewpoint-differential effects like those identified by Judge Noonan. For example, a prohibition of obscene speech surely makes it more difficult to advocate sexual libertinism than to argue for sexual restraint. A law forbidding incitement, even if it fully complies with the standards of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), will bear more harshly on radical critics of the government than on defenders of the status quo. Similarly, a content-neutral restriction like the ban on camping in a park upheld in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1983), will make it more difficult to dramatize the plight of the homeless than to demonstrate for many other causes. Such viewpoint-differential *effects* are the inevitable consequence of many forms of regulation. They cannot possibly be sufficient

to invalidate a regulation of speech, so long as the government is not engaging in deliberate discrimination against a particular point of view.

d. Finally, petitioners, citing various messages that appeared in advertising spaces on City buses after the new policy was adopted, appear to suggest that the City enforced its policy in a discriminatory or arbitrary fashion. See Pet. 3-4. But the district court carefully reviewed each of these alleged instances of discriminatory enforcement, and found, in each case, that the City had followed its established policies. In each case, either the message in fact proposed a commercial transaction, or the City was fulfilling a contractual obligation it incurred before the new policy went into effect. See Pet. App. 66a-73a. As the district court found (*id.* at 66a):

> The City honored contracts into which it entered prior to the adoption of the new Policy and continued to run such advertisements until the contractual obligations were fulfilled. The City has not, however, accepted new advertisements that are not commercial in nature since the adoption of the new Policy on November 1, 1996.

The court of appeals explicitly affirmed these findings of the district court (Pet. App. 16a), and petitioners point to nothing in the record that would warrant questioning the concurrent factual findings of the two courts below. Indeed, the questions presented in the petition, fairly read, do not comprise any claim that the City administered its policy in a discriminatory or arbitrary way. See Pet. i. There is, accordingly, no basis for any claim that the City's policy—on its face or as applied—was anything other than viewpoint-neutral.

3. Contrary to petitioners' contention, the decision of the court of appeals does not conflict with the decisions

of any other lower court. In fact, the decisions of other courts of appeals—including several of those cited by petitioner—strongly support the ruling of the court of appeals in this case.

Petitioners assert, for example (Pet. 22-23), that the court of appeals' decision in this case conflicts with *New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123 (2d Cir.), cert. denied, 119 S. Ct. 68 (1998). But the linchpin of the Second Circuit's decision in that case was that the Metropolitan Transportation Authority's standards "allow both commercial and political speech" (136 F.3d at 130). It was precisely for that reason that the Second Circuit found the space on the outside of the Authority's buses to be not a nonpublic forum but a "designated public forum" (*ibid.*) from which an advertisement with political overtones could not be excluded. See *id.* at 131-132. Far from ruling in a way that conflicts with the decision in this case, the Second Circuit left no doubt that it would uphold the policy that the City adopted here: "[d]isallowing political speech, and allowing commercial speech only" (*id.* at 130, citing *Lehman*, 418 U.S. at 304). See also *Lebron v. National Railroad Passenger Corp.*, 69 F.3d 650, on rehearing, 89 F.3d 39 (2d Cir. 1995), cert. denied, 517 U.S. 1188 (1996); *Paulsen v. County of Nassau*, 25 F.2d 65, 70 (2d Cir. 1991).

Petitioners also mistakenly rely (Pet. 23) on *Lebron v. WMATA*, 749 F.2d 893 (D.C. Cir. 1984), in which the court began its analysis by noting that there was "no[] * * * question" that the public transportation authority "ha[d] converted its subway stations into public fora by accepting * * * political advertising" (*id.* at 896)—in sharp contrast to the practice of the City of Phoenix in this case. The District of Columbia Circuit in *WMATA* then ruled that the authority had mistakenly excluded a

political advertisement on the ground that it was deceptive. But that court, like the Second Circuit, went out of its way to suggest explicitly that the authority might be able to avoid such difficulties in the future by "declining to accept political advertising in general." *Id.* at 899 (footnote omitted).

The same is true of *Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority* [*SEPTA*], 148 F.3d 242 (3d Cir. 1998), cert. denied, 119 S. Ct. 797 (1999), also cited by petitioners (Pet. 23 n.15). There, too, the court of appeals, in holding that SEPTA could not refuse an advertisement, explicitly distinguished *Lehman* on the ground that SEPTA, unlike the authority in *Lehman*—and unlike the City of Phoenix in this case—"has no longstanding practice of prohibiting [such] ads * * * SEPTA's past practice is, instead, to include such ads." 148 F.3d at 255. See also *id.* at 252 ("We conclude then, based on SEPTA's written policies, which specifically provide for the exclusion of only a very narrow category of ads * * * and based on SEPTA's practice of permitting virtually unlimited access to the forum, that SEPTA created a designated public forum."). See also *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority* [*SORTA*], 163 F.3d 341, 346 & n.1, 355 (6th Cir. 1998) ("[I]n accepting a wide array of political and public-issue speech, SORTA has demonstrated its intent to designate its advertising space a public forum.").

In *AIDS Action Committee v. Massachusetts Bay Transportation Authority*, 42 F.3d 1 (1st Cir. 1994), another case with which petitioners claim a conflict (Pet. 19-20), the court concluded that a public transportation authority had violated its own policy of excluding advertisements containing sexual innuendo, thus giving rise to an unrebutted inference that the authority was in fact dis-

criminating on the basis of viewpoint. See 42 F.3d at 11-12. As we have noted, petitioners have no basis for claiming (and, in their questions presented, do not claim) that Phoenix engaged in impermissible viewpoint discrimination. The court in *AIDS Action Committee* explicitly declined to reach the question whether the policy involved in that case would be constitutional if evenhandedly applied. See *id.* at 9-11.

Finally, petitioners assert that the decision below conflicts with *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983), which disapproved a policy of excluding political advertisements from display cases at airports. But as petitioners concede (Pet. 17 n.12), the court's conclusion in that case was premised on the view that an airport is a public forum. See 708 F.2d at 764-67. Not only is this premise inconsistent with this Court's subsequent decision in *ISKCON*, *supra*, but even the court in *U.S. Southwest Africa* carefully distinguished *Lehman*, explaining that "the buses at issue in *Lehman*"—unlike, in that court's view, airports—were not "the type of wide-open public forum where the free flow of information is especially vital." 708 F.2d at 766.

There is, accordingly, no conflict among the courts of appeals on the issue presented by this case. On the contrary, the courts that have addressed similar issues have uniformly indicated that they would reach the same conclusion as the court below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY TO BRIEF IN OPPOSITION

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888

TABLE OF CONTENTS

Page

Table of Authorities ii

Reply Argument 1

I. Respondents Candidly Admit That the Challenged Regulation Had the Purpose and the Effect of Accomplishing Viewpoint Discrimination 1

II. The Courts of Appeals Are In Conflict on the Questions Presented 4

Conclusion 5

TABLE OF AUTHORITIES

Page(s)

Cases

AIDS Action Committee v. Massachusetts Bay Transportation Authority, 42 F.3d 1 (1st Cir. 1994) . . . 5

Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1988) 2

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 2

Lebron v. Washington Metropolitan Transit Authority, 749 F.2d 893 (D.C. Cir. 1984) 5

Lehman v. City of Shaker Heights, 418 U.S. 893 (1974) . 2-3

New York Magazine v. Metropolitan Transportation Authority, 136 F.3d 123 (2d Cir.), *cert. denied*, 119 S. Ct. 68 (1998) 4-5

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) 1, 2

U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983) 4

United Food and Commercial Workers Union v. SORTA, 163 F.3d 341 (6th Cir. 1998) 5

Wirta v. Alameda-Contra Costa Transit District, 68 Cal.2d 51, 64 Cal. Rptr. 430, 434 P.2d 982 (1967) 4

ARGUMENT

I. RESPONDENTS CANDIDLY ADMIT THAT THE CHALLENGED REGULATION HAD THE PURPOSE AND THE EFFECT OF ACCOMPLISHING VIEWPOINT DISCRIMINATION.

In their Brief in Opposition, respondents do not deny that their exclusion of political and religious speech from the forum they created was purposeful. *Cf.* App. at 30a ("In its Answer, the City of Phoenix admitted the facial ban on non-commercial speech is aimed at excluding 'political' and 'religious' speech from advertising on City owned buses"). Instead, respondents contend that the purposeful exclusion of such does not present an important federal question. *See* Opp. at 11-12 (e.g., "Petitioners also renew their somewhat puzzling contention . . . that the City's policy is invalid because the City's 'admitted purpose [was] to exclude political and religious expression'").

In addition to their conceded *purpose* of excluding political and religious viewpoints by permitting only commercial solicitations, respondents also concede that their regulation would inevitably achieve its intended *effect*. Opp. at 12 ("Such viewpoint-differential *effects* are the inevitable consequence of many forms of regulation").

Effective, targeted exclusions of all political and religious perspectives and expression from a forum created by the government are unconstitutional. This is not a "puzzling contention," as respondents assert, but the clear teaching of this Court's cases. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995) ("These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation" . . . "Once it has opened a limited forum, however, the State . . . may not . . . discriminate against speech on the basis of its viewpoint")

(citations omitted); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others'") (citation omitted).

Indeed, in *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788 (1988), this Court held that even when viewpoint discrimination lurks behind a neutral "pretext," it is unconstitutional. 473 U.S. at 812. *A fortiori*, where the government *admits* that its goal is the elimination of disfavored viewpoints, the challenged restriction fails constitutional muster. Even if only content, rather than viewpoint discrimination is involved, an exclusion from a forum must be shown to be "reasonable in light of the purpose served by the forum." *Rosenberger*, 515 U.S. at 829. The record in this case contains nothing supporting the reasonableness of excluding *all* speech that is not a commercial solicitation from the transit display spaces. Respondents do not suggest that it does. Instead, respondents rely on the incorrect (and untenable) proposition that a city seeking to raise revenue through leasing city property or advertising space may, as a matter of right, exclude all noncommercial messages from that space if it so chooses.

In asserting this remarkable proposition, respondents rely entirely on this Court's decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). Opp. at 7-10. *Lehman* involved a ban, not on all non-commercial solicitation, as here, but on "short term candidacy or issue-oriented advertisement," 418 U.S. at 304, i.e., all political campaign advertising. In upholding this specific, limited exclusion, the plurality found persuasive the City of Shaker Heights concerns about the possibly injurious impact of short-term, partisan, political advertisements. 418 U.S. at 304. Such advertisements raise "sticky administrative problems . . . in parceling out limited

space to eager politicians" with the consequence that "[t]here could be lurking doubts about favoritism." *Id.* The City also feared that including short-term, partisan, political advertisements would jeopardize long-term commercial contracts. *Id.*

Phoenix's complete ban on *all* non-commercial expression is not in the least supported by the much more limited exclusion of partisan, political campaign advertisements involved in that case. It is simply absurd to suggest, as respondents do, that the City's refusal to display a quotation from the Bible, accompanied by the slogan, "Choose Life," or a statement that "The ACLU Supports Free Speech for Everyone" is justified by feared losses of "long-term commercial advertising," or by feared "lurking doubts of favoritism," or by the specter of "sticky administrative problems" related to "parceling out limited space to eager politicians."

From the quite limited accommodation described by the plurality in *Lehman*, the City of Phoenix seeks to craft the legal justification for a broad, viewpoint-based restriction on speech. The city's efforts to justify or even to explain its restriction, however, fall far short of the justifications accepted in that case by the *Lehman* panel. App. at 27a (Judge Noonan, dissenting) ("the avoidance of violence against the buses seems to border on the absurd; the other two rationales . . . would both be served by the kind of precision suggested here").

Respondents invocation of *Lehman* as support for such a broad, purposeless exclusion of all non-commercial expression from an established forum emphasizes the need for this Court's review in order to clarify the applicable constitutional principles in this important area.

II. THE COURTS OF APPEALS ARE IN CONFLICT ON THE QUESTIONS PRESENTED[1]

Respondents' contention that the decision below is not in conflict with decisions of other courts of appeals rests on a misreading of those cases.

Respondents deny that the decision below conflicts with *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983). To be sure, the court of appeals proceeded on the view that the transit display spaces were public fora. 708 F.2d at 764-67. Respondents' argument to that point, however, is merely a distraction from the actual conflict over the appropriate level of scrutiny to be applied to exclusions of messages because of their political or religious perspectives or content. Pet. at 17.

Respondents also contend that the decision below is not in conflict with *New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123 (2d Cir.), *cert. denied*, 119 S. Ct. 68 (1998). Opp. at 14. In *New York Magazine*, however, the court of appeals stated, "where there are both commercial and political elements present in speech, even the determination whether the speech is commercial or not may be fraught with ambiguity and should not be vested in an agency such as the MTA." 136 F.3d at 125. The judgment below invests the City of Phoenix below with unbridled discretion to make such determinations.[2]

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1. Respondents leave unanswered *Wirta v. Alameda-Contra Costa Transit District*, 68 Cal.2d 51, 64 Cal. Rptr. 430, 434 P.2d 982 (1967) (here). *Compare* Pet. at 16-17 n.11 *with* Opp. at 13-16.

2. *New York Magazine* contradicts respondents in other essential points: "it cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes ipso facto a nonpublic forum, such that we would examine the exclusion only for reasonableness." 136 F.3d at 129-30. Respondents, however, substitute

Respondents deny that there is a conflict with *Lebron v. Washington Metropolitan Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984). To justify that conclusion, Respondents ignore the very point on which *Lebron* and the judgment below conflict: the constitutionality of delegating unbridled discretion to transit display managers to deny access to transit display spaces. *Compare* Opp. at 14-15 with Pet. at 23.

Finally, respondents argue that, unlike, *AIDS Action Committee v. Massachusetts Bay Transportation Authority*, 42 F.3d 1 (1st Cir. 1994), there is no viewpoint discrimination here, and that petitioners have not, in any event, raised such a claim in the questions presented.[3] Opp. at 16. But an admitted animus against religious and political speech is viewpoint discrimination, as is exclusion of commercial advertisements just because they were presented from *religious* or *political* perspectives.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

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their conclusory determination (that the spaces were not a public forum because political and religious speech had been excluded from them) for a reasoned consideration of the public forum status of the exterior display spaces. Respondents disregard *New York Magazine*'s explanation that the value of identifying excluded categories of speech in these cases does *not* lie in the premise that "the exclusion of categories of speech creates a non-public forum . . . ." 136 F.3d at 130.

3. Respondents are mistaken. The problem of viewpoint discrimination in this case is plainly within, or at least fairly included within, the first and second questions presented in the petition. Pet. at *i*.

4. "[T]he government nevertheless violates the First Amendment when its stated purpose in reality conceals a bias against the viewpoint advanced by the excluded speakers." *United Food and Commercial Workers Union v. SORTA*, 163 F.3d 341, 356 (6th Cir. 1998).

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